Neutral Citation Number: [2024] EWHC 895 (Ch)

Case No. BL-2022-001008

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Tuesday, 13th February 2024

Before:
THE HONOURABLE MRS JUSTICE BACON

B E T W E E N:

FABRIZIO D'ALOIA

and

PERSONS UNKNOWN
CATEGORY A & OTHERS

MR C DE AZEVEDO appeared on behalf of the Claimant
MS C EBORALL appeared on behalf of the Second Defendant
MR N YEO & MS J FU appeared on behalf of the Fifth Defendant
MR D CONNELL appeared on behalf of the Sixth Defendant

APPROVED JUDGMENT

MRS JUSTICE BACON:

Amendment and strike-out application

1. This is an application by the claimant to amend his particulars of claim, and an application by D5 to strike out the claim against it. I have had submissions from counsel for the claimant, D2, D5 and D6. D3 and D4 have not played any part in this hearing, nor have the categories of defendants referred to as D1 and D7.

Strike-out application

2. It is convenient to start out with the strike-out application. The claim form was issued on 24 June 2022 on the same day as a without notice freezing order was granted by Mr Justice Trower. The particulars of claim were served on the defendants on 7 July 2022. Amended particulars of claim followed on 12 December 2022. The second to sixth defendants are included as defendants to the claim, not on the basis that they were involved in the underlying alleged cryptocurrency fraud against the claimant but on the basis that they operate cryptocurrency exchanges into which the claimant's crypto assets are said to have been transferred as a result of the alleged fraud. The second to sixth defendants have therefore been referred to as the "Exchange Defendants", and D5 is one of those Exchange Defendants.

3. The basis of the claim against D5, as originally pleaded and maintained in the amended particulars of claim, rests entirely on one particular cryptocurrency wallet, OKX 61BB, the private key to which is controlled by D5. That wallet is said to hold cryptocurrency claimed by the claimant in the sum of 310,000 USDT. That sum in that particular wallet was the subject of the freezing order obtained and maintained by the claimant insofar as it has concerned D5. No other relevant wallet is said to be controlled by D5 on the basis of the claim as currently pleaded, and no other assets of D5 are covered by the freezing order.

4. The basis of the claim in relation to wallet OKX 61BB was the evidence of the claimant's cryptocurrency tracing expert, Mr Robert Moore, originally set out in a report dated 21 June 2022 for the purposes of the without notice freezing injunction hearing. Mr Moore was, at that time, at the consulting firm Mitmark and his initial report has therefore been referred to as "the Mitmark report". The claimant's case based on the evidence in the Mitmark report was that some of his cryptocurrency could be traced into the OKX 61BB wallet. D5 has always denied that the claimant could trace any of his assets to that wallet.

5. At a CCMC on 27 February 2023 Master Pester gave directions for the trial of the claim, including disclosure, witness evidence and the exchange of expert reports. Pursuant to those directions the trial was set down for eight days in a window commencing on 4 June 2024.

6. The expert reports were exchanged on 15 December 2023. Mr Moore had by then left Mitmark and had started a new consultancy business called Arrowsgate; his new report has therefore been referred to as "the Arrowsgate report". The Arrowsgate report now entirely abandons the claim that any of the claimant's crypto assets can be traced into the OKX 61BB wallet. Instead it says that there are four other wallets controlled by D5 which may have received some of the claimant's assets.

7. I will consider that new case shortly, in relation to the claimant's application to amend his particulars of claim. For the purposes of the strike-out application what is relevant is the claim as it currently stands. In that regard it is apparent that no claim whatsoever is maintained by the claimant in relation to the OKX 61BB wallet. The claimant's claim in relation to that wallet is denied and has always been denied by D5, is no longer supported by the claimant's expert, and is no longer pursued by the claimant. That claim must be struck out and the freezing order in relation to that wallet must be discharged. The matter is as simple as that.

8. The question is then whether the claimant can maintain any claim at all against D5 on the basis of the amendments which he now seeks to make to refer to different cryptocurrency wallets operated by D5. It is therefore to the amendment application that I now turn.

The amendment application

9. The changes sought to be introduced in the draft amended particulars of claim fall into three strands. First there are comprehensive amendments to the descriptions of the cryptocurrency wallets said to hold the claimant's crypto assets and the amounts claimed to be held in those wallets. The OKX 61BB wallet is deleted. Another wallet controlled by D2 referred to as the Binance 3957 wallet is also deleted. The amounts of cryptocurrency claimed to be traceable by the claimant into the wallets controlled by DD2, 3, 4 and 6 have almost all changed with the sole exception of one wallet controlled by D2 for which the amount claimed remains the same. Finally, 14 new wallets have been added into which the claimant says that his assets can be traced. Six of those are D2 wallets, one is a D3 wallet, one is a D4 wallet, four are D5 wallets and two are D6 wallets.

10. Secondly the claimant seeks to expand his unjust enrichment claim against all of the Exchange Defendants to introduce a claim that those defendants behaved in a "commercially unacceptable way" by virtue of failures of corporate governance and due diligence in relation to the activities on their exchanges. The claimant's expanded pleading is set out over six pages of the draft amended particulars of claim, referring to a raft of UK guidance and policy documents, primary and secondary legislation and various standards said to be internationally recognised standards and rules.

11. Thirdly the claimant seeks to introduce a new claim against the Exchange Defendants in knowing receipt of trust property based on the particulars of commercially unacceptable conduct already set out.

12. There is no serious dispute as to the relevant legal principles. They have been set out in numerous cases, including in particular *CIP Properties v Galliford Try* [2015] EWHC 1345 (TCC), §§14–19, *Quah Su-Ling v Goldman Sachs* [2015] EWHC 759 (Comm), §§36–39 and *Pearce v E and NE Herts NHS Trust* [2020] EWHC 1504 (QB), §10.

13. Those cases establish that an amendment is regarded as being "very late" when the trial date has been fixed and where permission to amend would cause the trial date to be lost, or would at least threaten the trial date, even if the application to amend is made some months before the trial is due to start. Where a very late amendment is made there is a heavy burden on the party seeking the amendment to show the strength of the new case and why justice to that party, its opponent and other court users requires that party to be able to pursue the new case. It will be necessary to consider the timing of the amendment, its history and the explanation for its lateness.

14. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission. If allowing the amendments would necessitate the adjournment of the trial that may be an overwhelming reason to refuse the amendments. In addition, any amendment must have a real prospect of success which means a claim that is more than merely arguable.

15. Applying those principles to the three sets of amendments sought by the claimant, it is clear that the application must be refused save only in two respects: (i) the deletion of the OKX 61BB wallet and the Binance 3957 wallet; (ii) the amendment of the amounts claimed in respect of the remaining wallets that are already pleaded in the particulars of claim.

16. I refuse the permission for the remaining amendments for the following reasons. First, it is far too late to make the amendments. The trial is now less than four months away and it is common ground as between all parties represented before me today that that trial date should be maintained. Disclosure has been given and witness statements and expert reports have been exchanged. The disclosure and evidence has focused solely on the existing pleaded case as to the wallets into which the claimant's crypto assets are said to be traceable and the amounts of the claimant's assets said to be held in those wallets.

17. If the claimant now seeks to plead a case in relation to entirely new wallets controlled by the Exchange Defendants, that will require all of those defendants to go back to square one and revisit every step in the evidence process from the start: disclosure, witness evidence and expert reports. They will, moreover, have to do so in a very truncated timetable in circumstances where they are, at the same time, preparing for the trial on the timetable already set in relation to the existing allegations for the existing wallets which have been made. It is wholly unreasonable to ask them to do that.

18. Mr De Azevedo, for the claimant, said that it would not be necessary to give disclosure of the internal ledgers held by the Exchange Defendants for each of the new wallets, because those ledgers are apparently not relied upon by the claimant's expert. D2, D5 and D6 have, however, all confirmed that they do consider that this disclosure will be required, and referred to their existing evidence which references the internal transaction information that was the subject of that disclosure. This included, for example, the report of D2's expert. For that reason, those defendants categorically reject the suggestion by the claimant that expert evidence could be exchanged before the process of disclosure and factual evidence in that sequence which was ordered in the CCMC and which has taken place in relation to the wallets currently pleaded by the claimant.

19. Mr De Azevedo in his reply effectively invited me to disregard the defendants' evidence and submissions on that point, but I cannot possibly do so at this stage: that is a matter for the trial judge. The position before me is that counsel for those three defendants have all categorically confirmed that they will all wish to rely or at least to preserve the possibility of relying on that disclosure, in the same way as those defendants have already relied on that disclosure in their evidence. It seems to me that they are entitled to take that position. It is apparent on that basis that the sequence of disclosure, factual evidence and expert reports, could not possibly take place before the trial which is now less than four months away.

20. There is also a specific further problem with the new wallets in that at least some of the account holders for those wallets are different to the account holders for the existing pleaded wallets. The wallet account holders in relation to the final destination of what is said to be the

claimant's assets are referred to collectively in the claim as D7, defined as "Persons Unknown Category B", but the identity of those account holders is, in fact, known to the parties, as is the identity of the account holders for the new wallets pleaded by the claimant. In the case of DD2 and 6, all of the new wallet holders are different from the wallet holders in relation to the current pleaded wallets, as counsel for those defendants confirmed at the hearing today.

21. While the existing wallet holders defined as D7 have not participated in the claim, that may well be, as counsel for the defendants suggested, because the method of serving those holders was through the deposit of NFTs in the relevant wallets. For any wallets identified now as being within the jurisdiction, however, the position on service would need to be different, and there is no reason to think that they would choose not to participate. In particular, one of the new D2 wallet holders is (as D2 has confirmed) a UK-based FCA authorised company, which D2 points out may well wish to participate in the proceedings given the serious allegations of fraud made against the D7 defendants. Any of the new account holders choosing to do so would, however, have to commence the litigation from scratch. Again, that would be wholly unreasonable in the very short time remaining to trial.

22. For all of these reasons it would be impossible to allow the new wallet amendments without adjourning the trial date. That is a very powerful reason to refuse those amendments.

23. As to the amendments to plead commercially unacceptable conduct on the part of the Exchange Defendants, which are the basis of the expanded pleading on unjust enrichment and the new claim of knowing receipt sought to be introduced by the claimant, those amendments fare no better. The claims are wide-ranging and refer to voluminous legislation and guidance, but they do not specify how any of that is said to apply to the Exchange Defendants, who are incorporated in the Cayman Islands (DD2–4), the Seychelles (D5) and Thailand (D6).

24. The claimant seeks to sidestep this problem by saying that it is for the Exchange Defendants to demonstrate how the regulatory regimes applicable to them differ from English law. There is a debate about the application of any presumption of similarity. I do not, however, need to get into that debate because the real problem is that the Exchange Defendants are entitled to investigate the position now that it has been put forward by the claimant in the amended pleading. As the Supreme Court said in *FS Cairo (Nile Plaza)* v *Brownlie* [2021] UKSC 45, [2022] AC 995, at §146:

> "It is always open to the party who is asserting a claim or defence based on foreign law to adduce direct evidence of the content of the relevant foreign law rather than take the risk of relying on the presumption. Equally it is always open to the other party to adduce such evidence showing that the foreign law is materially different from the corresponding English law, rather than taking the risk that the presumption will be applied".

25. The Exchange Defendants would therefore have to have the opportunity to consider whether to adduce expert evidence of foreign law. As Mr Yeo said, before doing so, those defendants would as matters stand likely wish to serve RFIs in relation to the very general allegations currently pleaded by the claimant in order to better understand the case that is now being advanced. It goes without saying that it is far too late to embark upon all of this now, this close to trial. Again, therefore, the amendments in this regard could not be made without adjourning the trial date.

26. Secondly I am not persuaded there is any good reason for the amendments to have been made at this late stage. Regarding the new wallet amendments, the claimant's expert, Mr Moore, has been instructed by the claimant from the outset and the defendants from the outset have raised concerns regarding his methodology, including detailed flaws in that methodology identified in 2022, long before the CCMC. It is said that the wholesale changes to the claimant's case on the wallets have arisen because of the new software, Crystal, which Mr Moore started to use when he set up his Arrowsgate Consultancy. But Mr Moore commenced employment with Arrowsgate in February 2023, began using Crystal in March 2023, and knew that the defendants had concerns regarding his methodology. There is no satisfactory explanation as to why it has taken this long for him to realise that the claim was being advanced in relation to the wrong wallets and the wrong amounts.

27. As for the amendments pleading commercially unacceptable conduct, the position there is even less satisfactory, because these are legal pleas that could have been made at any time. There is no good reason at all why those arguments could not have been advanced from the outset. Mr De Azevedo said that the amendments were made in response to comments by Master Pester regarding the lack of particularity of the claimant's case made at the hearing on 30 January 2024 when Master Pester refused the claimant's application to adduce further expert evidence. But that is not and cannot be a good justification for a comprehensive repleading of the legal case against the Exchange Defendants at this very late stage before trial.

28. The necessity for the trial to be adjourned if the amendments were to be permitted, and the absence of any good reason for introducing the amendments at this very late stage, are in my judgment overwhelming reasons to refuse permission to amend. If the claimant wishes to advance his new arguments, he will have to do so by way of a new claim. There is no limitation reason which prevents him from doing so, and then proceeding with that claim in an orderly manner.

29. For completeness, I should record that the Exchange Defendants before me today advanced real concerns regarding the prospects of success of a new pleaded case in any event, particularly in relation to the new claim of knowing receipt. They objected that the claimant has still not adequately pleaded an explanation of how his knowing receipt claim can survive a defence of change of position, *bona fide* purchaser and ministerial receipt. These points do carry some force, in my judgment and are examples of what is, on any basis, a very unsatisfactory proposed pleading by the claimant on these issues. But I do not need to reach a definitive conclusion on this point, because the points that I have already made concerning delay and the impossibility of maintaining the trial date are sufficient, in my judgment, for me to determine without any hesitation that the application to amend should be refused.

30. The amendment application is therefore refused and it also follows that the claim against D5 is struck out in its entirety.

Costs

31. There are costs applications by all three of the represented defendants today. Their applications differ because of the different orders made in respect of the defendants, so I will deal with them in turn.

D5

32. The first application is by D5 for the entirety of its costs of its claim, given that the claimant's claim has been struck out against it. Mr Yeo refers to offers to settle the proceedings for 50% of the costs, in January and March 2023, and January and February 2024. He says that the claimant's solicitors knew that Mr Moore was using the new Crystal software (or at least had access to that new software) from March 2023, and should have instructed him to revisit his analysis at that stage. He relies on what he says was a worrying reluctance to face up to the change of case, with correspondence late last year saying it was not Mr Moore's intention to alter his analysis.

33. Mr Yeo also points out that once Mr Moore's analysis had changed in the Arrowsgate report served in mid-December 2023, the claimant did not do anything to notify the court that the freezing order would need to be discharged in relation to the OKX 61BB wallet. Indeed nothing was filed with the court in that respect until the amended application was formally filed on 6 February 2023. Mr Yeo relies generally on the lateness of the amendment application which formed part of his submissions on the substance of that application.

34. For all of those reasons, his application is for indemnity costs from the outset of the action or at least since March 2023. Pragmatically, he suggests that indemnity costs could be awarded from May 2023 when his client changed solicitors.

35. I consider that there is not enough material before me for me to make the determination that the claimant's conduct was so unreasonable from the outset as to warrant an indemnity costs order. In relation to the new software used I have already found that the claimant should, at that point, have revisited his case. But without further material as to the discussions within the claimant's legal team and the position taken by Mr Moore (which would likely be privileged in any event), I do not think I have quite enough to say that their failure to do so was sufficiently egregious so as to warrant an order for indemnity costs.

36. I do consider, however, that as soon as the Arrowsgate report was filed on the 14 December 2023, the claimant should have done two things. First he should have very promptly indicated an intention to replead his case as regard to the new wallets. Secondly, he should have applied to discharge the freezing order in relation to the wallets for which he was no longer pursuing a claim, as well as amending that order in relation to all of the other wallets. He did not do so. Instead he waited until 6 February 2024 before filing his amended application.

37. I have already found in my main judgment that that delayed matters considerably, and I do not consider that there is any good justification for that delay. I do not, therefore, consider that the claimant's conduct in that regard was either reasonable or proper, and it has led to this application coming on very late in the day with very little notice to the defendants. I take on board that the claimant did suggest that today's hearing might be adjourned, but that would have been even worse because it would have been even closer to the trial date. That is one of the reasons why I directed that both applications should remain listed for today. The fact that the parties have, in the event, been able to address both applications today does not, however, excuse the claimant's failure to notify the defendants considerably earlier that he was going to make his amendment application.

38. For those reasons I consider that D5 should have its costs on the indemnity basis from the date on which the expert reports were exchanged. I will order a payment on account of 62% of the

total costs. This reflects the fact that the latter part of the costs accrued should be paid on the indemnity basis. The costs are to be paid by the claimant within 28 days.

D2

39. D2 asks for its costs summarily assessed on the indemnity basis, referring to similar factors as raised by Mr Yeo, namely an inordinate delay in bringing the application, the fact that there was no notice of the application, the fact that the amendments were found by me to be poor and unparticularised, the claimant's obfuscation of his position in relation to his expert, and the claim (also referred to by Mr Yeo) that his evidence would not be changing.

40. As with D5, I do consider that these factors warrant an order for the costs of today's hearing to be paid on the indemnity basis. As to the detail of that the only significant point taken by Mr De Azevedo in relation to D2's schedule of costs is that the hourly rates claimed are too high. I will order the payment of the amounts claimed in the costs schedule, subject to the reduction of the hourly rates to the current guideline London rates. I will leave the parties to work out the figure for that and put that in the order.

D6

41. D6 has asked for its costs, again summarily assessed on an indemnity basis. All of the same points apply. I will make an order for indemnity costs in relation to today's hearing. The hourly rates claimed are below the guideline hourly rates. There does not seem to be anything in the schedule of work done which is unreasonable. The total claim of £38,031.13 is a modest claim for what was a significant application, with work required at the very last minute in the circumstances that I have just explained, and for which all parties provided substantial and detailed skeleton arguments. I think that it would be entirely reasonable to summarily assess those costs at 100% of the costs claimed by D6.

Other consequential matters

42. As for the remaining aspects of the order, the freezing order will need to be discharged in relation to not only D5 in its entirety but also in relation to the Binance 3957 wallet. The injunction will also need to be amended to reflect any reductions in the amounts claimed in respect of the remaining wallets.

43. I do not have an application to extend the injunction to any other wallets. That would in any event not have been granted, given the fact that I have refused permission to amend in that regard. Nor is there any application to increase the amounts specified in the freezing order to reflect the wallets for which the existing claims have been increased. I therefore do not order any variation in that regard. Of course, if the parties agree such amendments in the process of drawing up the order, then that order can be made; but absent agreement between the parties I am not going to order that.

End of judgment.

Transcript of a recording by Ubiqus (Acolad UK Ltd)

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