

**IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

[2022] SGHC 264

Originating Claim No 41 of 2022 (Summons No 1800 of 2022)

Between

Janesh s/o Rajkumar

... Claimant

And

Unknown Person
("CHEFPIERRE")

... Defendant

GROUNDS OF DECISION

[Civil Procedure — Injunctions — Proprietary injunction]

[Civil Procedure — Service — Substituted service out of jurisdiction]

CONTENTS

INTRODUCTION.....	1
BACKGROUND	3
WHETHER THE COURT HAD THE JURISDICTION TO HEAR THE APPLICATION.....	13
JURISDICTION AGAINST AN UNKNOWN PERSON.....	15
WHETHER AN INJUNCTION RESTRAINING THE DEFENDANT FROM DEALING WITH THE BORED APE NFT SHOULD BE GRANTED.....	20
WHETHER THERE WAS A SERIOUS QUESTION TO BE TRIED	21
<i>Whether the Bored Ape NFT, or NFTs in general were capable of giving rise to proprietary rights which could be protected by an injunction</i>	<i>22</i>
WHETHER THE BALANCE OF CONVENIENCE LAY IN FAVOUR OF GRANTING THE INJUNCTION	37
WHETHER THE APPLICATION FOR SUBSTITUTED SERVICE OUT OF JURISDICTION SHOULD BE GRANTED	38
CONCLUSION.....	43

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Janesh s/o Rajkumar
v
Unknown Person (“CHEFPIERRE”)

[2022] SGHC 264

General Division of the High Court — Originating Claim No 41 of 2022
(Summons No 1800 of 2022)

Lee Seiu Kin J
13 May 2022

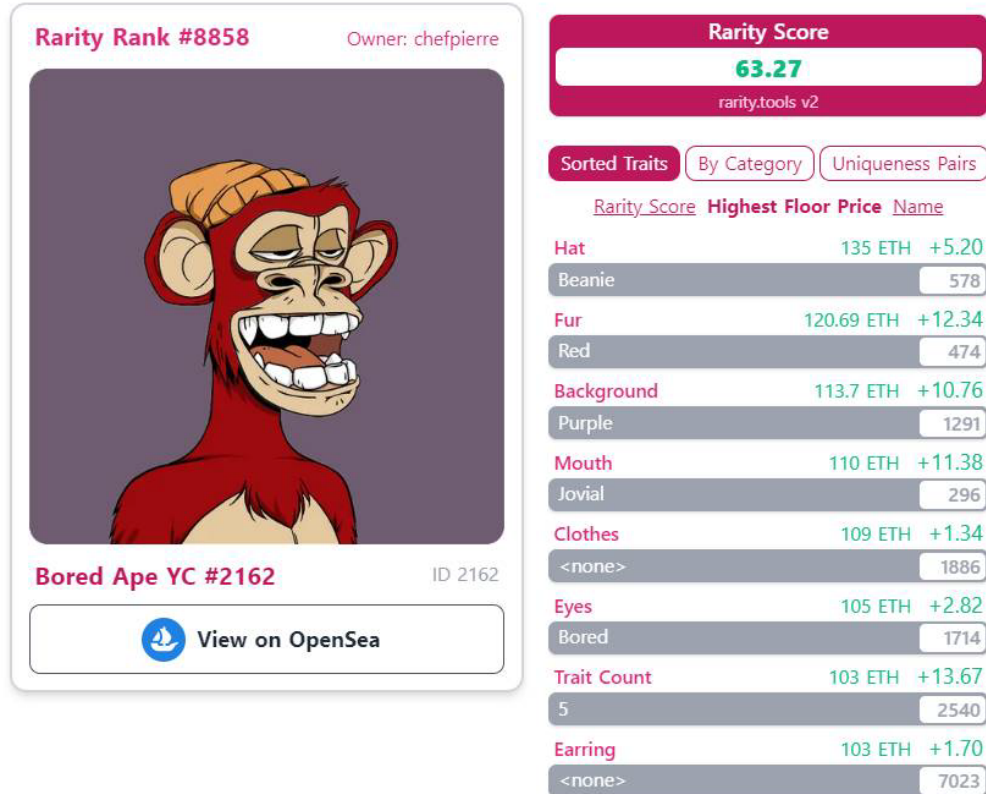
21 October 2022

Lee Seiu Kin J:

Introduction

1 Cars, books, wine and luxury watches – these are but, to name a few examples, highly sought-after items for collectors. For digital nomads, however, especially those steeped in the world of blockchain and cryptocurrencies, Non-Fungible Tokens (“NFTs”) have, in recent times, emerged as a highly sought-after collectors’ item. They are, to draw an analogy, the equivalent of a Rolex Daytona, or a F.P. Journe, to a horology enthusiast. Such is the hype around such NFTs that it is not uncommon to read about them being sold for sums of money that are puzzling to the unconverted. For fans of such NFTs, however, it seems that it is well worth the cost.

2 In the present case, the claimant was the proud owner of an NFT known as the Bored Ape Yacht Club (“BAYC”) ID #2162 (the “Bored Ape NFT”):¹



Rarity Rank #8858 Owner: chefpierre

Bored Ape YC #2162 ID 2162

[View on OpenSea](#)

Rarity Score
63.27
rarity.tools v2

Sorted Traits By Category Uniqueness Pairs

	Rarity Score	Highest Floor Price	Name
Hat	135 ETH	+5.20	Beanie
Fur	120.69 ETH	+12.34	Red
Background	113.7 ETH	+10.76	Purple
Mouth	110 ETH	+11.38	Jovial
Clothes	109 ETH	+1.34	<none>
Eyes	105 ETH	+2.82	Bored
Trait Count	103 ETH	+13.67	5
Earring	103 ETH	+1.70	<none>

3 The Bored Ape NFT was precious to the claimant.² That was apparent from his affidavit. The claimant, however, had lost “possession” of the Bored Ape NFT – he therefore brought the present application for an injunction to restrain the defendant from dealing with it.³

¹ Claimant’s First Affidavit at para 5.

² Claimant’s First Affidavit at para 52.

³ Claimant’s First Affidavit at paras 121, 132–133.

4 In the earlier case of *CLM v CLN* [2022] SGHC 46 (“*CLM*”), I had dealt with the question of whether stolen cryptocurrency assets, specifically Bitcoin and Ethereum, could be the subject of a proprietary injunction. Having considered the cases and the analysis in *Ruscoe v Cryptopia Ltd (in liq)* [2020] 2 NZLR 809 (“*Ruscoe*”), I was of the view (at [46]) that the claimant in that case was able to prove a serious arguable case that the stolen cryptocurrency assets were capable of giving rise to proprietary rights, which could be protected via a proprietary injunction.

5 The present application that was before me raised similar issues. This was unsurprising – given the rapid pace at which modern technology develops, disputes arising out of the application and deployment of such new technologies will become more common. The one pressing concern which most lawyers will encounter is whether the fabric of the common law can be extended, in a principled fashion, to cover disputes involving these technologies: see *eg*, *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 (“*B2C2 (CA)*”) at [144]; Vincent Ooi, “Contracts Formed by Software: An Approach from the Law of Mistake” (2022) *Journal of Business Law* 97 at 112–113; Gary Chan Kok Yew and Yip Man (eds), *AI, Data and Private Law: Translating Theory into Practice* (Hart Publishing, 2021).

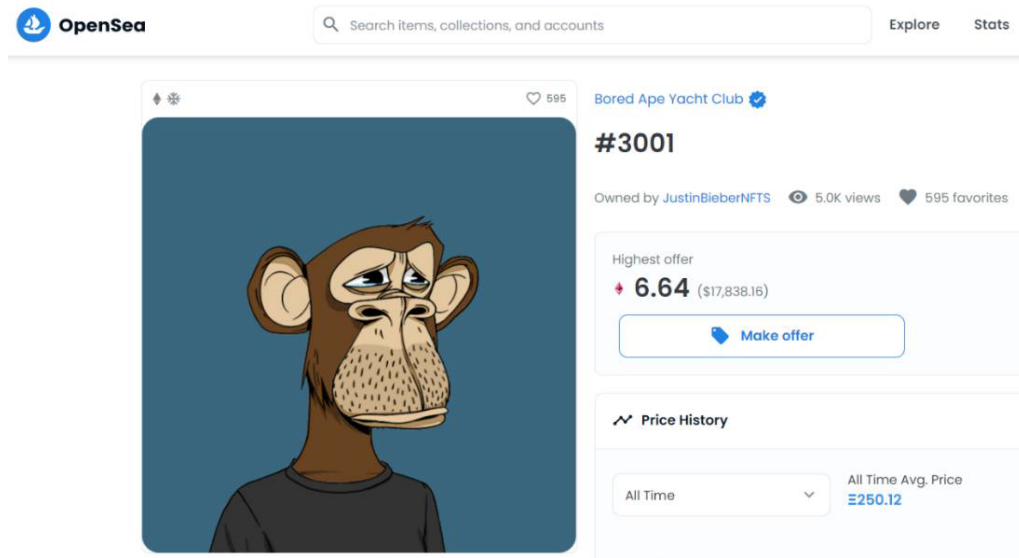
Background

6 The claimant averred that the Bored Ape NFT was a unique and irreplaceable artwork.⁴ The Bored Ape NFT was part of a collection of 10,000 other pieces of artwork depicting apes with different unique attributes.⁵ The NFTs within the BAYC collection were hugely popular, and owned by a number

⁴ Claimant’s First Affidavit at para 5.

⁵ Claimant’s First Affidavit at para 8.

of celebrities, including Justin Bieber who owned this particular NFT (reproduced below):⁶



7 This, according to the claimant, spoke volumes as to the monetary value placed on NFTs within the BAYC collection, and the fact that such NFTs were also status symbols.⁷

8 In relation to the technical aspects of such NFTs, each NFT within the BAYC collection was minted on the Ethereum blockchain with an individual, and unique hash number recorded on the blockchain together with a unique token ID which served as publicly verifiable proof of its provenance.⁸ The Bored Ape NFT had the following hash number recorded on the blockchain:

⁶ Claimant's First Affidavit at para 14.

⁷ Claimant's First Affidavit at paras 14 – 15.

⁸ Claimant's First Affidavit at para 9.

11c6ce8133ae11a9008557dd1c0bdd4b81d88b9d1609ab4dac2716a4b3f14465.

9

9 In relation to the visual characteristics of the Bored Ape NFT, the claimant described it as being the only one of its kind in existence.¹⁰ The Bored Ape NFT had, according to OpenSea – a marketplace for trading NFTs – the following special characteristics:¹¹

- (a) A “jovial mouth” – a trait which only 3% of BAYC NFTs had.
- (b) “Red fur” – a trait which only 5% of BAYC NFTs had.
- (c) A “beanie hat” – a trait which only 6% of BAYC NFTs had.
- (d) “Bored Eyes” – a trait which only 17% of the BAYC NFTs had.
- (e) A “Purple Background” – which only 13% of the BAYC NFTs had.
- (f) It was a “virgin ape”.¹² What this meant, in the claimant’s words, was that it was an ape that had not been “fed with any mutant serum” previously, and so the Bored Ape NFT retained its potential of producing another, unique piece of art.¹³ This “mutant serum”, when applied to a NFT within the BAYC collection, produced a mutated version of the original ape – this was known as a Mutant Ape Yacht Club

⁹ Claimant’s First Affidavit at para 9.

¹⁰ Claimant’s First Affidavit at para 5.

¹¹ Claimant’s First Affidavit at para 11.

¹² Claimant’s First Affidavit at para 23.

¹³ *Ibid.*

NFT (“MAYC NFT”).¹⁴ This meant that each owner of an NFT in the BAYC collection could also own a MAYC NFT which was a unique asset, separate from the original ape. The claimant also stated that it was “very possible for BAYC to initiate more projects in the future to allow BAYC NFT owners to create more unique artwork, for example, those based on artificial intelligence and robots”.¹⁵

10 The claimant acquired the Bored Ape NFT on 6 August 2021 when he purchased it for 15.99 ETH from a user operating under the pseudonym “victorjia_eth” on OpenSea.¹⁶ The claimant was a regular user on NFTfi, which is a community platform functioning as an NFT-collateralised cryptocurrency lending marketplace.¹⁷ He would often enter into loan transactions with other users to borrow cryptocurrencies with NFTs as collateral.¹⁸ One NFT he would use as collateral was the Bored Ape NFT; its rarity and high value allowed him to obtain larger sums of cryptocurrency loans.¹⁹

11 Because the Bored Ape NFT was extremely precious to the claimant, he would take special care when using it as collateral.²⁰ For instance, he would generally only deal with reputable lenders which were highly ranked by NFTfi’s ranking system. Further, for every loan transaction in which he used the Bored

¹⁴ Claimant’s First Affidavit at para 21.

¹⁵ Claimant’s First Affidavit at para 23.

¹⁶ Claimant’s First Affidavit at para 19.

¹⁷ Claimant’s First Affidavit at para 26.

¹⁸ Claimant’s First Affidavit at para 27.

¹⁹ *Ibid.*

²⁰ Claimant’s First Affidavit at para 28.

Ape NFT as collateral, he was careful to specify the following terms as part of the loan agreement:²¹

- (a) The Bored Ape NFT would be transferred to NFTfi’s escrow account to be held until full repayment of the loan was effected.
- (b) In the event that the claimant was unable to make full repayment of the loan on time, he would inform the lender who should provide reasonable extensions of time for repayment.
- (c) At no point should the lender utilise the “foreclose” option of NFTfi’s Smart Program on the Bored Ape NFT without first granting the claimant reasonable opportunities to make full repayment of the loan and retrieve the Bored Ape NFT from the escrow account.
- (d) At no point would the lender obtain ownership, nor any right to sell or dispose of the Bored Ape NFT. The lender could only, at best, hold on to the Bored Ape NFT, pending repayment of the loan.

The claimant would not, because the Bored Ape NFT was precious to him, enter into any loan agreement with lenders who were unwilling to agree on the aforementioned terms.

12 The claimant explained that the reason why he had to specify these terms was because NFTfi facilitated such loan agreements through smart contracts, which are computer programs that automatically carry out a given set of instructions upon the fulfilment of pre-set conditions (“NFTfi’s Smart Program”).²² The NFTfi’s Smart Program allowed for the repayment of the

²¹ Claimant’s First Affidavit at para 28.

²² Claimant’s First Affidavit at para 29.

loans as well as the unilateral “foreclosure” on the NFTs by the lender if the specified payment was not made by the stipulated date.²³

13 The claimant, on the basis of these terms (set out above at [9]), had successfully borrowed and paid back numerous cryptocurrency loans using the Bored Ape NFT as collateral. The lenders complied with his terms, and at no point did they exercise, or purport to exercise the “foreclose” option on the NFTfi’s Smart Program, or attempt to remove the Bored Ape NFT from his possession.²⁴

14 Things it seemed, were going swimmingly for the claimant – that is, until he began dealing with the defendant, whom he only knew by the pseudonym “chefpierre.eth”.²⁵ Given the urgency in which the claimant took out the present application, exactly who was behind the pseudonym “chefpierre.eth” was unknown. However, it appeared that “chefpierre.eth” would post regularly on Twitter.²⁶ And according to the claimant, it would be possible, given time, to obtain the identity of “chefpierre.eth”.

15 Sometime in or around early January 2022, the claimant reached out to “chefpierre.eth” to discuss the possibility of obtaining a loan.²⁷ The claimant informed “chefpierre.eth” about his terms regarding the Bored Ape NFT (see [11] above), and made it abundantly clear that the Bored Ape NFT was

²³ Claimant’s First Affidavit at para 29.

²⁴ Claimant’s First Affidavit at para 31.

²⁵ Claimant’s First Affidavit at para 32.

²⁶ Claimant’s First Affidavit at para 34.

²⁷ Claimant’s First Affidavit at paras 47–48.

extremely precious to him and that he did not wish to relinquish “possession” of it.

16 On 6 January 2022, having secured assurance from “chefpierre.eth” that the Bored Ape NFT would not be “foreclosed”, the claimant entered into a loan agreement with “chefpierre.eth” for 45 ETH. The loan was for a period of 90 days, with interest payable at 33% per annum.²⁸ The claimant subsequently repaid this loan.

17 On 18 March 2022, “chefpierre.eth” offered the claimant another loan. Given their prior dealings, the claimant felt comfortable transacting with “chefpierre.eth”. Both parties entered into another loan agreement on 19 March 2022 (the “19th March Loan”), subject to the claimant’s usual terms (see [11] above) for 150,000 DAI. DAI is another cryptocurrency and 150,000 DAI was equivalent to USD\$150,000.²⁹ The loan period was 30 days, with interest payable at 45% per annum.³⁰

18 On 17 April 2022, the claimant told “chefpierre.eth” that he would require a short extension of time to repay the 19th March Loan. In response, “chefpierre.eth” agreed to the extension, and reassured the claimant that the Bored Ape NFT would be returned to him once the loan was repaid in full.³¹

19 Two days later, on 19 April 2022, the claimant informed “chefpierre.eth” that he had reached out to another user under the pseudonym, “homer”, for a loan to repay the outstanding amount owed under the 19th March

²⁸ Statement of Claim at para 27.

²⁹ Claimant’s First Affidavit at paras 45 and 66.

³⁰ Statement of Claim at para 32

³¹ Statement of Claim at para 35.

Loan.³² After some discussion, “chefpierre.eth” agreed to enter into a refinancing loan with the claimant. Under this new agreement, the claimant would take out a new loan with “chefpierre.eth”, with the Bored Ape NFT as collateral. “chefpierre.eth” would then deduct the outstanding amount owed in the 19th March Loan from the fresh funds provided to the claimant.³³

20 “chefpierre.eth”, however, later changed his mind and issued an ultimatum, stating that he would not extend any refinancing loan and that he would exercise the “foreclose” option of the NFTfi’s Smart Program if the 19th March Loan was not fully repaid by 21 April 2022, 5 a.m Singapore time.³⁴

21 Caught flat footed, the claimant was unable to find sufficient funds to repay the 19th March Loan.³⁵ “chefpierre.eth” exercised the “foreclose” option of the NFTfi’s Smart Program and the Bored Ape NFT was transferred from NFTfi’s escrow account into his cryptocurrency wallet.³⁶

22 The claimant said that he was devastated by this. But he still clung to the hope that “chefpierre.eth” would return the Bored Ape NFT once full payment was made. He therefore made part-payment of the 19th March Loan and reminded “chefpierre.eth” of the terms of their agreement.³⁷ “chefpierre.eth”, however refused to discuss the matter further and informed the claimant that he would be keeping the Bored Ape NFT for himself. Thereafter, “chefpierre.eth”

³² Statement of Claim at para 36.

³³ Statement of Claim at para 38.

³⁴ Statement of Claim at para 41.

³⁵ Statement of Claim at para 43.

³⁶ Statement of Claim at para 44.

³⁷ Statement of Claim at para 45.

returned the part-payment which the claimant had made and prevented the claimant from making any further payments.³⁸

23 Since then, the claimant discovered that “chefpierre.eth” had listed the Bored Ape NFT for sale on OpenSea (an online NFT marketplace). There were, according to the claimant, a number of offers made for the Bored Ape NFT.³⁹

24 The claimant therefore filed a suit against the defendant, “chefpierre.eth”, and claimed that:

(a) He had an “equitable proprietary claim” over the Bored Ape NFT.⁴⁰

(b) The defendant was liable to him in the tort of conversion,⁴¹ breach of contract,⁴² and unjust enrichment.⁴³

25 Given the real risk of dissipation and disposal of the Bored Ape NFT,⁴⁴ the claimant made an urgent application to court in summons no 1800 of 2022 (“SUM 1800”) for the following orders:

(a) A proprietary injunction prohibiting the defendant from in any way dealing with the Bored Ape NFT, until after the trial of originating claim no 41 of 2022 (“OC 41”). OC 41 was filed in the General Division

³⁸ Statement of Claim at para 46.

³⁹ Statement of Claim at para 47.

⁴⁰ Statement of Claim at para 49.

⁴¹ Statement of Claim at para 51.

⁴² Statement of Claim at paras 53 – 54.

⁴³ Statement of Claim at para 56.

⁴⁴ Claimant’s Skeletal Submissions at para 3.

of the Singapore High Court by the claimant against the defendant on the same date as SUM 1800. The injunction would apply to any appeals arising therefrom, such dealings including but not limited to selling or disposing of the Bored Ape NFT and using the Bored Ape NFT as collateral in transaction with any third party.

(b) Leave be granted for the claimant to serve (i) a copy of the originating claim and statement of claim; and (ii) a copy of the summons for injunction and any order(s) made therein (collectively, the “Court Documents”) on the defendant by the following means:

- (i) on the defendant’s Twitter Account;
- (ii) on the defendant’s Discord Account; and
- (iii) on the messaging function of the Defendant’s cryptocurrency wallet address 0x0e616785638663C88A493a82972E2F9CaDAab4bc.

(c) The time for entry of an appearance in this action by the defendant be twenty-one (21) days after service of the court documents on him, inclusive of the day of service.

(d) Liberty to apply.

(e) The costs of and occasioned by this application be in the cause.

(f) Such further or other relief as the court deems fit.

26 I heard counsel for the claimant on 13 May 2022 and allowed the application. These are the reasons for my decision.

Whether the court had the jurisdiction to hear the application

27 The claimant argued that, notwithstanding the fact that the domicile, residence and present location of the defendant was unknown, the Singapore court was the appropriate court to hear the application for the injunction on the basis that:⁴⁵

(a) There was sufficient nexus to Singapore. The claimant is a Singapore citizen who carried on business from Singapore and owned property in Singapore.⁴⁶ Further, he entered the transactions concerning the Bored Ape NFT in Singapore.⁴⁷

(b) There was a serious question to be tried on the merits of the claim.

(c) Singapore was the *forum conveniens*. If the Singapore courts did not hear the case, there was no other appropriate forum. This was because the Bored Ape NFT existed as code stored on the Ethereum blockchain, which is essentially a decentralised network of ledgers maintained in computers around the world.⁴⁸

28 The claimant also referred me to the case of *Tulip Trading v Bitcoin Association for BSV & Ors* [2022] EWHC 667 (“*Tulip Trading*”). The claimant in that case, Tulip Trading Limited (“TTL”), was the subject of a hack which rendered it unable to control, or use, a very substantial amount of Bitcoin which it claimed to own. TTL’s case was that the defendants, none of whom were

⁴⁵ Claimant’s Written Submissions at para 51.

⁴⁶ Claimant’s Written Submissions at para 52.

⁴⁷ Claimant’s Written Submissions at para 53.

⁴⁸ Claimant’s Written Submissions at para 57.

within the jurisdiction, were the core developers and/or otherwise controlled the software in respect of the relevant digital asset networks. TTL filed a claim, alleging that the defendants owed it a fiduciary and/or tortious duties, and applied for service out of jurisdiction. Permission to serve out of jurisdiction was granted on 7 May 2021. However, several of the defendants challenged the court's jurisdiction. This meant that the court had to reconsider whether, effectively by rehearing, permission to serve out should be given: *Tulip Trading* at [47]. The question then, which Justice Falk had to decide, was whether the requirements to obtain leave for service out of jurisdiction as summarised in *VTB Capital plc v Nutritek International Corp & Ors* [2012] EWCA Civ 808 at [99]–[101] were satisfied, namely:

- (a) Was there a serious issue to be tried on the merits of the claim?
- (b) Was there a good arguable case that the claim fell within one or more of the classes for which leave may be given set out in paragraph 3.1 of Practice Direction 6B (which supplements Part 6 of the Civil Procedure Rules on the service of documents, and sets out guidelines on service out of jurisdiction).
- (c) That in all the circumstances, England was clearly or distinctly the appropriate forum for the trial of the dispute, and the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

29 Justice Falk set aside the order granting permission for service out of jurisdiction on the basis that TTL had not established a serious issue to be tried on the merits of the claim. But if there had been a serious issue to be tried (*Tulip Trading* at [167]), Justice Falk took the view that England was the appropriate forum for the trial of the dispute, and that the court ought to exercise its

discretion to permit service of the proceedings out of the jurisdiction. In her view, the primary connecting factors were TTL's presence in the jurisdiction, including that of its agent and primary witness, Dr Wright, who had lived in the jurisdiction since 2015 and intended to apply for citizenship. TTL also had the better of the arguments that the digital assets were located in the jurisdiction and that damage has been or will be sustained here.

30 In the present case, I was satisfied that the court had the jurisdiction to hear the present application. While the decentralised nature of blockchains may pose difficulties when it comes to establishing jurisdiction, to my mind, there had to be a court which had the jurisdiction to hear the dispute. In the present case, based on the available facts before me, that court was the Singapore court. The primary connecting factor was the fact that the claimant was located in Singapore, and carried on his business here.

Jurisdiction against an unknown person

31 The identity of the person behind the pseudonym "chefpierre.eth" was unknown. In their skeletal submissions, the claimant relied on the case of *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 1633 for the proposition that an injunction could be granted against unknown persons provided the description of these unknown persons was sufficiently certain to identify the persons falling within and outside of that description.⁴⁹ The claimant also relied on my decision in *CLM* where I had concluded (at [31]) that the court had the jurisdiction to grant interim orders against the first defendants in that case, who were also persons unknown.

⁴⁹ Claimant's Skeletal Submissions at para 6.

32 The application in *CLM*, however, was brought under the old Rules of Court (Cap 322, R5, 2014 Rev Ed) (“ROC 2014”). I had found that the ROC 2014 did not require the defendant to be specifically named (*CLM* at [28]). The application before me, however, being brought after the 1st of April 2022, was therefore subject to the new Rules of Court (Cap 322, Rules of Court 2021) (“ROC 2021”). Here, the claimant submitted that nothing in the ROC 2021 required a defendant to be specifically named.⁵⁰

33 Under the ROC 2021, a writ of summons is now called an originating claim. The originating claim must be in Form 8: O 6 r 5(1) ROC 2021. Similarly, what was formerly referred to as an originating summons is now referred to, under the ROC 2021, as an originating application, which must be in either Form 15 (where the originating application must be served) or 16 (where service may be dispensed with): O 6 r 11(1). A glance at both Forms 8 and 15 reveals that the claimant’s name and identification number, as well as that of the defendant must be stated. O 3 r 6, however, states that the practice directions, which contains the relevant forms, “must be used with such variations as the circumstances require”.

34 As I noted in *CLM* (at [29]), in relation to O 2 r 1 of the ROC 2014:

... Even if the commencement of proceedings against persons unknown contravenes the ROC, such a contravention is treated as a mere irregularity, and will not result in the nullification of proceedings unless the court exercises its discretion to order the same:

Non-compliance with Rules (O. 2, r. 1)

1.—(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply

⁵⁰ Claimant’s Skeletal Submissions at para 8d.

with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, *the failure shall be treated as an **irregularity** and **shall not nullify** the proceedings, any step taken in the proceedings, or any document, judgment or **order** therein.*

(2) Subject to paragraph (3), the Court **may**, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or **order** therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

...

[emphasis added in bold italics and italics]

Plainly, the reference to “order” in the above provision covers interim orders such as injunctions.

[emphasis in the original]

35 However, under the ROC 2021, O 3 r 2(4)–(5) states:

General powers of Court (O. 3, r. 2)

(4) Where there is non-compliance with these Rules, any other written law, the Court’s orders or directions or any practice directions, the Court may exercise all or any of the following powers:

- (a) subject to paragraph (5), waive the non-compliance of the Rule, written law, the Court’s order or direction or practice direction;
- (b) disallow or reject the filing or use of any document;
- (c) refuse to hear any matter or dismiss it without a hearing;
- (d) dismiss, stay or set aside any proceedings and give the appropriate judgment or order even though the non-compliance could be compensated by costs, if the non-compliance is inconsistent with any of the Ideals in a material way;
- (e) impose a late filing fee of \$50 for each day that a document remains unfiled after the expiry of the period within which

the document is required to be filed, excluding non-court days;

(f) make costs orders or any other orders that are appropriate.

(5) Where the non-compliance is in respect of any written law other than these Rules, the Court may waive the non-compliance only if the written law allows such waiver.

36 It is apparent from the ROC 2021 that where there has been non-compliance with the Rules, the court has the power, the scope of which is set out under O 3 r 2(4) to deal with such non-compliance. In contrast, under O 2 r 1 of the ROC 2014, non-compliance with the requirements under the Rules was treated as an irregularity which would not nullify the proceedings or any order therein.

37 The question, therefore, was whether the failure to name the defendant, in the precise manner as stipulated in the relevant forms, meant that there was non-compliance with the Rules. In my view, this did not amount to non-compliance. Here, O 3 r 1 states:

Ideals (O. 3, r. 1)

1.—(1) These Rules are to be given a purposive interpretation.

(2) These Rules seek to achieve the following Ideals in civil procedure:

(a) **fair access to justice;**

(b) expeditious proceedings;

(c) cost-effective work proportionate to —

(i) the nature and importance of the action;

(ii) the complexity of the claim as well as the difficulty or novelty of the issues and questions it raises; and

(iii) the amount or value of the claim;

(d) efficient use of court resources;

(e) fair and practical results suited to the needs of the parties.

(3) The Court must seek to achieve the Ideals in all its orders or directions.

(4) All parties have the duty to assist the Court and to conduct their cases in a manner which will help to achieve the Ideals.

[emphasis in bold]

38 As is made clear by O 3 r 1, the ROC 2021 is to be interpreted purposively, and the Court must seek to achieve the Ideals in all its orders and directions. To my mind, requiring strict compliance with the formality requirements of an originating application or claim may well restrict access to justice. As the present case has demonstrated, it is perfectly possible to have concluded a contract with someone else online, where both parties have concealed their true identities using pseudonyms. Should a claimant be barred from seeking interim relief, or bringing a claim, unless he is able to name the defendant, instead of using his pseudonym? I think not.

39 That said, this does not mean that the formality requirements may be dispensed of in their entirety. That would make a mockery of the Rules. Here, I would reiterate what I had earlier said in *CLM* (at [32]) – the description of the defendant must be sufficiently certain so as to identify both those who are included and those who are not. In *CLM* (at [34]), I was satisfied that the following description which had been used sufficed:

[A]ny person or entity who carried out, participated in or assisted in the theft of the Plaintiff's Cryptocurrency Assets on or around 8 January 2021, save for the provision of cryptocurrency hosting or trading facilities.

40 In the present case, the defendant was described as follows:⁵¹

⁵¹ Claimant's Written Submissions at para 36.

- (a) The defendant was identified as the user behind the account “chefpierre.eth” on Twitter and Discord as of the date of filing of this Application.
- (b) The defendant was identified as the person to whom the Bored Ape NFT had been transferred to.

41 I was satisfied that the present description had, with sufficient certainty, described persons falling within and outside that description. In the alternative, even if the Rules required the defendant to be named, and that the failure to do so meant that there was non-compliance with the form requirements set out under O 6 r 5(1) and O 6 r 11(1) of the ROC 2021, I was prepared to waive this instance of non-compliance.

42 The court therefore had, in my view, the jurisdiction to grant the interim orders sought against the defendant, who is an unknown person in this case, notwithstanding the introduction of the ROC 2021.

Whether an injunction restraining the Defendant from dealing with the Bored Ape NFT should be granted

43 The General Division of the High Court has the power, pursuant to s 18(2) read with para 5(a) of the First Schedule of the Supreme Court of Judicature Act 1969 (2020 Rev Ed), to grant interim proprietary injunctions. To obtain such an injunction, however, the applicant must establish the following requirements (*Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and another and another* appeal [2015] 5 SLR 558 (“*Bouvier*”) at [143]–[164]):

- (a) There is a serious question to be tried; and

(b) The balance of convenience lies in favour of granting the injunction.

44 The claimant argued that the requirements in *Bouvier* were satisfied. There was a serious question to be tried as the facts “deposed to by the Claimant [were] well-supported by contemporaneous written conversation[s] between the Claimant and the Defendant as well as actions taken by both parties in relation to [Bored Ape NFT] and the utilisation of NFTfi’s Smart Programs”⁵². Further, because the assets in this case were blockchain-based, there was a public and irrefutable record of the transactions and actions undertaken with regards to the Bored Ape NFT and the exchange of cryptocurrency.⁵³ The claimant also argued that the balance of convenience lay in favour of granting the injunction: without it, the defendant would be able to dispose of the Bored Ape NFT. If that happened, the loss suffered by the claimant could not be compensated by an award of damages as the Bored Ape NFT was a unique and irreplaceable artwork.⁵⁴

Whether there was a serious question to be tried

45 I turn now to deal with the first requirement set out in *Bouvier*. As I noted in *CLM* (at [39]):

39 As stated by the Court of Appeal in *Bouvier* (at [151]), in respect of an application for an interlocutory proprietary injunction, the first requirement of showing that there is a serious question to be tried will be satisfied as long as “**the plaintiffs have a seriously arguable case that they [have] a proprietary interest**”. In this regard, the court does not engage in complex questions of law or fact at the interlocutory stage.

⁵² Claimant’s Written Submissions at para 30

⁵³ Claimant’s Skeletal Submissions at para 5(a).

⁵⁴ Claimant’s Skeletal Submissions at para 5(b).

[emphasis in bold]

46 The claimant therefore had to show that he had a seriously arguable case that he had a proprietary interest in the Bored Ape NFT. Naturally, this rested on the assumption that the Bored Ape NFT, or NFTs in general were capable of giving rise to proprietary rights which could be protected *via* a proprietary injunction.

47 The following issues therefore arose for consideration:

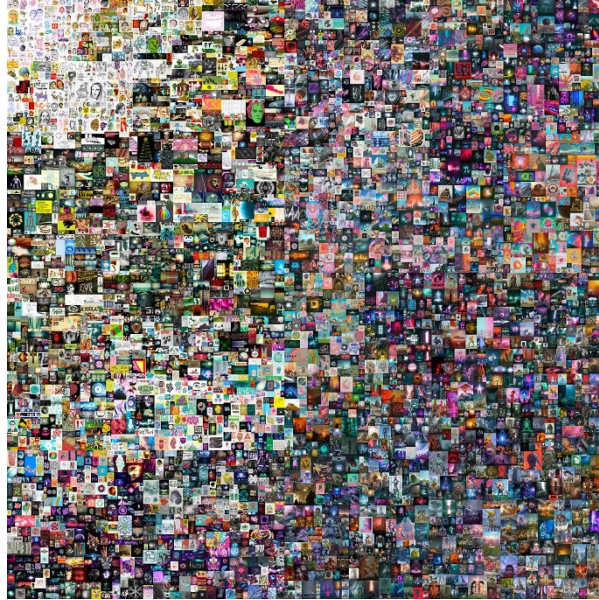
- (a) Was the Bored Ape NFT, or NFTs in general, capable of giving rise to proprietary rights which could be protected by an injunction?
- (b) Was it seriously arguable that the claimant had a proprietary interest in the Bored Ape NFT (bearing in mind that the court does not consider complex questions of fact or law at the interlocutory stage)?

48 I turn now to consider each issue, *seriatim*.

Whether the Bored Ape NFT, or NFTs in general were capable of giving rise to proprietary rights which could be protected by an injunction

49 It is perhaps apposite, at this juncture, to delve a little into the technology behind NFTs. It should be noted that NFTs are associated not only with digital artwork, music and writing, but also contractual assets such as tickets to event as well as physical assets such as cars and yachts. Since the property in question is a digital artwork, I shall limit the discourse to such NFTs and use the very first NFT, of an artwork created by an artist going by the pseudonym “Beeple”, as an example.

50 Beeple created an artwork called “Everydays: The First 5000 Days” (“Beeple’s Artwork”) (a thumbnail of which is reproduced below):



51 It is important to bear in mind that the above image is the result of a string of code (the “image file”) which instructs the computer to generate the image that appears on the screen. Image files can be in various formats such as JPG, PNG, GIF, MP4, etc. The image file associated with a particular NFT may be stored on the blockchain itself (an “on-chain NFT”) but the cost of this could be high if the image size is large. It is more common to store only the metadata of the image on the blockchain (an “off-chain NFT”). The metadata contains information about the image file such as the author, file creation date, file size. Once this metadata file is produced, it is then “hashed”.

52 Beeple’s Artwork had a file size of some 300 megabytes. It was stored on a decentralised file sharing system called the InterPlanetary File System (“IPFS”) at the following link:
<https://ipfsgateway.makersplace.com/ipfs/QmXkxpWAHCtDXbbZHUwqtFuc>

G1RMS6T87vi1Cdvdfl7qA. In the case of Beeple’s Artwork, the link to the image file residing in the IPFS was contained within the metadata file.

53 Beeple’s metadata was then “hashed” – using an algorithm, a popular example of which would be SHA2-256, to produce an output of a fixed length (*ie*, the “hash”). What this means is that an exactly identical file will always produce the same output. The hash serves to identify the original data in the image – any changes to the original image will result in a different hash value. In this case, the hash value of Beeple’s Artwork was: QmXkxpwAHCtDXbbZHUwqtFucG1RMS6T87vi1Cdvdfl7qA.

54 At this point, one might wonder where the NFT is in all of this. Beeple created the token using a code (or what those in the crypto space would call a “smart contract”) called the MakersTokenV2 – this was a derivation of the popular ERC721 which powers most NFTs on the Ethereum blockchain. What this piece of code did was to create a new token in the crypto wallet address of Beeple who, as the controller of the wallet, would be able to transfer this token to another crypto wallet (*eg*, to a buyer who pays him for it). This ability to transfer a token to another wallet means, in effect, that Beeple is the “owner” of the NFT.

55 NFTs have been characterised as certificates of ownership “powered by smart contracts and protected by blockchain technology”: Pinar Caglayan Aksoy and Zehra Ozkan Under, “NFTs and Copyright: Challenges and Opportunities” (2021) 16(10) *Journal of Intellectual Property Law & Practice* 1115 at p 1115. However, from our rough description of what an NFT is above, it would be clear that, in most cases and certainly in the present case, all an NFT contains is a link to the server where the *actual* image itself can be found. Even

if one is dealing with an “on-chain” NFT, it is, essentially, a string of code which includes the code for the image.

56 From this, it could be argued that all that is acquired when one “buys” an NFT is merely information. If, however, NFTs are characterised as information, one may expect to find serious objections towards granting it property status. As Prof Lee Pey Woan notes (Lee Pey Woan, “Personal Data as a Proprietary Resource” in Gary Chan Kok Yew and Yip Man (eds), *AI, Data and Private Law: Translating Theory into Practice* (Hart Publishing, 2021) (“*Personal Data as a Proprietary Resource*”) at p 101):

To sum up, the real objections to treating information as property are twofold. First, the free flow of information is of paramount importance, so informational access should not be curtailed as a general rule. **Second, information has a poor fit with conventional concepts of ownership, title and transfer because of its fluidity and variability in function and conception. These are serious hurdles, but they are by no means absolute impediments.** As alluded to above, the individual’s interests in privacy and self-determinacy are significant counterweights that may justify some curtailment of access to information. While it is true that information should not, in general, be privatised, personal data may warrant special treatment as a means of augmenting the data subject’s legal rights and control. Of course, information being intangible and non-rivalrous is not, in its natural state, an excludable resource. Such exclusivity, if desired, can only be artificially constructed by legal means.

[emphasis added]

57 However, where crypto assets (*ie*, cryptocurrencies, tokens and NFTs) are concerned, it may not be entirely appropriate to characterise them as information. As Gendall J noted in *Ruscoe* (at [127]):

[I]t is wrong in any event to regard cryptocurrencies as mere information because:

- (a) The whole purpose behind cryptocurrencies is to create an item of tradeable value not simply to record or

to impart in confidence knowledge or information. Although cryptocurrencies are not backed by the promise of a bank, the combination of data that records their existence and affords them exclusivity is otherwise comparable to the electronic records of a bank. The use of the private key also provides a method of transferring that value. This might be seen as similar in operation to, for example, a PIN on an electronic bank account.

(b) And, generally, as I see it, cryptocurrencies are no more mere information than the words of a contract are. What allows a contract to be capable of being an item of property is not the words nor even the binding promise which is only a personal obligation, but the fact that equity recognises there is a unique relationship between the parties created by the words and then supplies a system for transferring the contractual rights. Similarly, a unique relationship and system of transfer exists with respect to the relevant data on the blockchain that makes up a cryptocurrency.

(c) In *Boardman v Phipps* Lord Upjohn stated: “In general, information is not property at all. It is normally open to all who have eyes to read and ears to hear.” This statement appears to confirm as a principle for not regarding information as property the fact that it can be infinitely duplicated. Again, this is not true of cryptocurrencies where every public key recording the data constituting the coin is unique on the system where it is recorded. It is also protected by the associated private key from being transferred without consent.

...

58 I agree with Gendall J’s observations in *Ruscoe*. NFTs, when distilled to the base technology, are not just mere information, but rather, data encoded in a certain manner and securely stored on the blockchain ledger: see *Amir Soleymani v Nifty Gateway LLC* [2022] EWHC 773 at [9]; *Hermès International and Hermès of Paris, Inc. v Mason Rothschild* (2022) F.Supp.3d at [1]. To characterise NFTs as mere information would ignore the unique relationship between the encoded data and the blockchain system which enables the transfer of this encoded data from one user to another in a secure, and verifiable fashion. The real objection to treating information as property depends on the functions

it is used for rather than on the plain fact that it is information: David Fox and Sarah Green, *Cryptocurrencies in Public and Private Law* (Oxford University Press, 2019) at para 6.44. When Lord Upjohn used the term “information” in *Boardman v Phipps* [1966] 3 WLR 1009, he was using it in the context of the knowledge that such information *informs* the reader. In the context of NFTs, the information concerned is a string of computer code (at its essence, zeros and ones) that does not provide any knowledge to those who have read it. It provides instructions to the computer under a system whereby the “owner” of the NFT has exclusive control over its transfer from his wallet to any other wallet.

59 In the same vein, there has been growing judicial support for “deploying property concepts to protect digital assets”: *Personal Data as a Proprietary Resource* at p 96. For example, in *Elena Vorotyntseva v Money-4 Limited t/a Nebeus.com and ors* [2018] EWHC 2596 (Ch) (“*Money-4 Limited*”), the applicant brought an urgent, *ex parte* application for a freezing order against the first respondent, Money-4 Limited trading as Nebeus.com, and its directors. The applicant had given to Nebeus.com some 293 Bitcoins and 400 Ethereum with a combined total value of £1.5 million. The applicant’s lawyers had asked for confirmation from Nebeus.com that the cryptocurrency was still in their possession and that it had not been dissipated. When such confirmation was not forthcoming, the application for the freezing order was sought. While Birss J, who heard the case, was satisfied that the court could make such an order if it was appropriate to do so, there was no suggestion before him that cryptocurrency could not be a form of property, or that a party “amenable to the court’s jurisdiction cannot be enjoined from dealing in or disposing of it” (*Money-4 Limited* at [13]).

60 The point on whether cryptocurrency could be a form of property was more fully developed in *AA v Persons Unknown who demanded bitcoin on 10th*

and 11th October 2019 and ors [2019] EWHC 3556 (Comm) (“AA”). In that case, the plaintiff was the insurer for a Canadian insurance company which had been hacked by the first defendant. The first defendant had bypassed the company’s firewalls and installed malware called “Bitpaymer”, which encrypted its computer systems. A ransom demand was made – the first defendant demanded payment of Bitcoins in exchange for the decryption tool. The insured company paid the ransom of some USD\$950,000 worth of Bitcoins on 10 October 2019. Subsequent investigations traced the Bitcoins paid to the second defendant whose wallet address was held by a cryptocurrency exchange (Bitfinex) operated by the third and fourth defendants. An application was taken out for a proprietary injunction in respect of the Bitcoins held at the account of the fourth defendant. Bryan J, who heard the case, had to deal with the preliminary, and fundamental, question of whether the Bitcoins were property at all: AA at [55]. Here, Bryan J noted that the immediate difficulty was that “English law traditionally views property as being of only two kinds, choses in possession and choses in action” (AA at [55], citing *Colonial Bank v Whinney* [1885] 30 Ch.D 261 (“*Colonial Bank*)). Bitcoins, and other cryptocurrencies, did not fall neatly into either category, and thus could not be classified as a form of property: AA at [56] and [58].

61 Bryan J, however, considered that it was “fallacious to proceed on the basis that the English law of property recognises no forms of property other than choses in possession and choses in action” (AA at [58]). In doing so, he cited extensively from the legal statement on cryptoassets and smart contracts published by the UK Jurisdiction Task Force (the “Legal Statement”). There, the Task Force took the view that the issue in *Colonial Bank* was not about the scope of property generally as there was no dispute that the shares were property – the relevant question in that case was whether they were things in action within the meaning of the Bankruptcy Act 1883: Legal Statement at [71]. In relation to

Fry J’s statement in that case, that “personal things [were] either in possession or in action, and that there [was] no third category”, while it could carry the logical implication that an intangible thing is not property if it is not a thing in action, it was unclear whether Fry J intended that corollary and it should not in any case be regarded as part of the reasoning leading to his decision: Legal Statement at [74]. The Task Force thus took the view that *Colonial Bank* was not to be treated as limiting the scope of what kinds of things could be property in law – rather, it showed the ability of the common law to stretch “traditional definitions and concepts to adapt to new business practices”: Legal Statement at [77]. After canvassing cases such as *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1931] 1 KB 672 and *Your Response Ltd v Datateam Business Media Ltd* [2015] QB 41, as well as various statutory provisions defining property in terms that assumed that intangible property was not limited to things in action, the Task Force concluded that “the fact that a cryptoasset might not be a thing in action on the narrower definition of that term does not in itself mean that it cannot be treated as property”: Legal Statement at [78]–[84].

62 The Legal Statement therefore formed the basis for Bryan J’s conclusion that while a crypto asset might not be a thing in action based on a narrow definition of that term, it could still be considered property: *AA* at [59]. He therefore made a finding that crypto assets such as Bitcoin were property, given that they met the four criteria set out in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (“*Ainsworth*”) at 1248 – namely that it must be “definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability”.

63 However, as Prof Kelvin Low notes in his commentary, “Bitcoins as Property: Welcome Clarity?” (2020) 136 Law Quarterly Review 345 (“*Bitcoins as Property*”) at pp 347–348:

The nature of choses in action in the common law was the subject of heated debate in the late 19th century within the pages of this *Review*: see Elphinstone (1893) 9 L.Q.R. 311; Sweet (1894) 10 L.Q.R. 303; Broadhurst (1895) 11 L.Q.R. 64; Williams (1895) 11 L.Q.R. 223; Sweet (1895) 11 L.Q.R. 238. **At the time, one of the most significant concerns was whether rules applicable to traditional contractual choses in action, such as that applicable to assignments, would apply to new forms of intangible property such as shares and intellectual property:** Holdsworth (1920) 33 Harv. L. Rev. 997 at 1029. It is the best explanation for the mysterious statutory rule in s.30(1) Patents Act 1977 declaring that patents are intangible property but not choses in action: see *Bridge et al, The Law of Personal Property*, 2nd edn (2017), at pp.175–176. In hindsight, this fear has been proven to be unfounded (see *Crosstown Music Company 1, LLC v Rive Droite Music Ltd* [2010] EWCA Civ 1222; [2012] Ch. 68 at [35] and [92]–[93] for copyright, not so statutorily classified) but a different, more conceptual, concern appears to have firmly taken root. **Traces of the same reasoning, which entail a narrow view of enforcement rights, can also be found, arguably even more clearly articulated,** in *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch); [2013] Ch. 156 at [48], criticised by Low and Lin (2015) 27 J.E.L. 377. **This entails the view that only Hohfeldian (cf. Hohfeld (1913) 23 Yale L.J. 16) claim rights would fall within the category of a chose in action.** The irony of courts allowing legal actions in respect of intangible property that are not choses in action because they do not entail rights enforceable by action appears to have eluded proponents of this view. But as this author observed elsewhere, in *Bridge et al, The Law of Personal Property* (2017), at p.175:

[S]uch a view of things in action both overemphasises the necessity of a right of action and underestimates the panoply of remedies available to a modern court. As to the former, the right of action serves the purpose of securing performance and in the vast majority of cases, things in action, even in the limited sense, are enjoyed in their performance rather than by way of action ... As to the latter, the availability of declaratory and quia timet injunctive relief also severely blunts the force of criticisms that no rights of action exist prior to infringement.

The fatal flaw in the reasoning process is also underscored by a curious sentence in the UK Jurisdiction Taskforce’s legal statement, (at [76], quoted by Bryan J. at [58] [of AA]):

Thus, to the extent that the House of Lords [in *Colonial Bank*] agreed with Fry LJ on the classification issue, that seems to have been on the basis that the class of things in action could be extended to all intangible property (i.e. it was a residual class of all things not in possession) rather than on the basis that the class of intangible property should be restricted to rights that could be claimed or enforced by action.

The only way in which this sentence makes any sense is by dissociating the category of things in action in its first half from the narrow view of enforceability of rights in the sense of Hohfeldian claim rights in its second. Otherwise, the statement would be an oxymoron.

[emphasis added]

64 Given Bryan J’s reliance on the Legal Statement in the finding that crypto assets could still constitute property even if they did not fall within the category of choses in action, it would be apposite to unpack what Prof Low meant in his critique of the Legal Statement, specifically, the “curious sentence”. Originally, the term “chose in action” encompassed all rights which were enforceable by action; this included, among other things, rights to a debt or rights of action on a contract (see Michael Bridge, *Personal Property Law* (Oxford University Press, 4th Ed, 2015) at p 229). This was, however, later extended to cover “documents such as bonds, which evidenced or proved the existence of such rights of action”: W.S. Holdsworth, “The History of the Treatment of ‘Choses’ in Action by the Common Law” (1920) 33(8) *Harvard Law Review* 997 (“*History of Choses*”). This subsequently led to the inclusion of other instruments such as bills of lading, and policies of insurance – these policies, however, were documents of title to what was essentially an incorporeal right of property. From this, there was no difficulty in including other things which were “even more obviously property of an incorporeal type” such as patents and copyrights: *History of Choses* at p 998.

65 With this brief history in mind, it is easier to see Prof Low’s issue with the reasoning adopted in the Legal Statement which took the following form: the House of Lords in *Colonial Bank* agreed with Fry LJ on the classification issue, seemingly on the basis that **A**, and not **B** where:

- (a) **A** = Class of chose in action could be extended to all intangible property.
- (b) **B** = Class of intangible property should be restricted to rights that could be claimed or enforced by action.

66 If a “chose in action” in **A** was referred to in the traditional sense (*ie*, rights or claims enforceable by action), then **A** = **B**, and the sentence would make no sense. *Per* Prof Low, the sentence would only make sense if the “chose in action” referred to in **A** did not mean rights that could be claimed or enforced by action. Therefore, the meaning of “chose in action” in **A** must go beyond mere “rights enforceable by action”, which appears to be the case if one looks at the historical treatment of choses in action (see [64] above).

67 It would be rather apparent by now, that the meaning of terms such as “choses in action” and “intangible property” as they are used may not be entirely clear (see also: Tan Yock Lin, *Personal Property Law* (Academy Publishing, 2014) at paras 01.004 and 01.011). If they are co-extensive, as Prof Low appears to suggest that they should be, then it may be possible to apply Fry LJ’s *tertium quid* in answering the question as to whether crypto assets such as Bitcoin or NFTs constitute property. Support for adopting a broader meaning of “chose in action” can be found in Gendall J’s remarks in *Ruscoe* (see also *Lim Lye Hiang v Official Assignee* [2012] 1 SLR 228 at [28] citing *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] 1 WLR 1035 at 1040E–G). He noted that

the common objection to finding that crypto assets are property is that they are neither tangibles nor choses in action, which are the only two classes of property recognised by the common law (*Ruscoe* at [122]). But this objection was, in his view, a red herring – the most that could be said was that cryptocurrencies would have to be classified as choses in action (see also Alvin W-L See and Yip Man, “Restitution of Mistakenly Transferred Bitcoins” (2022) *Lloyd’s Maritime and Commercial Law Quarterly* 46 at p 48). It was “ironic that something that might be said to have more proprietary features than a simple debt is deemed not to be property at all when a simple debt qualifies” (*Ruscoe* at [124]).

68 That being said, arguments as to whether crypto assets such as NFTs could be considered choses in action, and the potential applicability of Fry LJ’s *tertium quid* were not advanced before me in the present case (*cf* Jeremiah Lau, “That New Chestnut – The Proprietary Status of Bitcoins” (2020) *Lloyds Maritime and Commercial Law Quarterly* 378 at pp 381–382). The trend of the case law has been to apply the *Ainsworth* criteria in deciding whether crypto assets are property, and this was something I had considered in *CLM* itself (see *CLM* at [46]). In *AA*, Bryan J, having reasoned his way around Fry LJ’s *tertium quid*, turned to the *Ainsworth* test to hold that cryptocurrencies were property (*AA* at [59]). In *Ruscoe*, it appears that Gendall J applied the *Ainsworth* criteria because counsel did not push the point that the common law only recognised two classes of personal property, and cryptocurrencies did not fall into either class (*Ruscoe* at [123]).

69 The *Ainsworth* test, however, as some may point out, is to some degree circular: Gray and Gray, *Elements of Land Law* (Oxford University Press, 5th Ed, 2009) at p 97. Prof Low also argued that the problem with using the test is that it “mixes up the various meanings which common lawyers give to the word ‘property’” notwithstanding the fact that what “may be the subject matter of a

trust and what may be the subject matter of a proprietary injunction, is wider than that envisaged by Lord Wilberforce in *Ainsworth*”: *Bitcoins as Property* at p 349. Here, I would emphasise that the present case was an urgent *ex parte* hearing – I therefore did not have the benefit of submissions from the defendant. The cases which were cited to me showed that other courts had, in dealing with similar issues involving the proprietary nature of crypto assets, applied the *Ainsworth* criteria. Further, having examined the analysis of Gendall J in *Ruscoe*, I was of the view that the *Ainsworth* criteria could be usefully applied to determine if crypto assets were property. That said, it bears noting that my decisions, both in *CLM* and in the present case, concerned interlocutory applications, and so should be read in the proper context. A different conclusion may well be reached with the benefit of fuller submissions. With that in mind, let us now turn to examine the application of the *Ainsworth* criteria in the present case. In *CLM*, I had (at [46]), taken the view that cryptocurrencies satisfied the definition of a property right as set out in *Ainsworth*. Similarly, in the present case, I was of the view that such NFTs did satisfy the *Ainsworth* criteria. The first *Ainsworth* criteria is that the right must be “definable” – essentially, the asset “must hence be capable of being isolated from other assets whether of the same type or of other types and thereby identified” (*CLM* at [45(a)], citing *Ruscoe* at [104]). This requirement is easily fulfilled – as explained (at [49]–[56] above), metadata is central to an NFT. It is this metadata which distinguishes one NFT from another.

70 The second requirement is that the “asset must have an owner being capable of being recognised as such by third parties” (*CLM* at [45(b)], citing *Ruscoe* at [109]). Where NFTs are concerned, the presumptive owner would be whoever controls the wallet which is linked to the NFT. Similar to cryptocurrencies, excludability is achieved because one cannot deal with the NFT without the owner’s private key.

71 The third requirement is that “that the right must be capable of assumption by third parties, which in turn involves two aspects: that third parties must respect the rights of the owner in that asset, and that the asset must be potentially desirable” (*CLM* at [45(c)], citing *Ruscoe* at [114]). In the present case, I was of the view these requirements would be met. Firstly, the nature of the blockchain technology gives the owner the exclusive ability to transfer the NFT to another party, which underscores the “right” of the owner. Secondly, such NFTs are clearly the subject of active trading in the markets.

72 The fourth, and final, requirement is that the “right and in turn, the asset, must have “some degree of permanence or stability”, although this is a low threshold since a “ticket to a football match which can have a very short life yet unquestionably it is regarded as property”” (*CLM* at [45(d)], citing *Ruscoe* at [117]). The NFT concerned has as much permanence and stability as money in bank accounts which, nowadays, exist mainly in the form of ledger entries and not cold hard cash.

73 While this suffices to dispose of the point, I would make two observations. First, the claimant had, in written submissions, referred me to the decision of the Singapore International Commercial Court in *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 (“*B2C2*”) for the proposition that “cryptocurrency, a form of digital assets, [was] a property in a generic sense for the purposes of being held on trust”.⁵⁵

74 However, as I noted in *CLM* (at [42]):

[T]he Singapore International Commercial Court held (at [138]–[146]) that it was possible for cryptocurrencies to be held on trust, and that the defendant in that case did hold BTC on trust

⁵⁵ Claimant’s Written Submissions at para 19.

for the plaintiff. In so holding, the court reasoned that cryptocurrencies meet the four requirements set out in *Ainsworth* and “have the fundamental characteristic of intangible property as being an identifiable thing of value” (at [142]). **However, it should be noted that since this point was undisputed by the parties, the court was satisfied that cryptocurrencies could be created as property in a generic sense and left open the question of what the precise nature of this property right was.**

[emphasis added]

75 While the Court of Appeal in *B2C2 (CA)* observed (at [144]) that there “may be much to commend the view that cryptocurrencies should be capable of assimilation into the general concepts of property”, it was unnecessary to consider this issue because even if it was answered in the affirmative, there was no certainty of intention to create a trust on the facts. It is clear then that the question of whether cryptocurrency could be considered as property was not decided in either *B2C2* or *B2C2 (CA)*.

76 The second observation relates to the grounds on which such an injunction is sought. Here, the basis of the injunction was proprietary (see [25(a)] above). As was noted in *Bouvier* (at [144]), an interlocutory proprietary injunction is granted in support of a claim for proprietary relief. Such an injunction is one which fastens on the specific asset in which the plaintiff asserts a proprietary interest, and prevents the defendant, pending the resolution of the dispute, from dealing with that asset and its traceable proceeds. Here, the claimant did plead, in his statement of claim, that he had a proprietary interest in the Bored Ape NFT (see [24] above). Therefore, any injunction sought would fasten onto the Bored Ape NFT and prevent the defendant from dealing with it, or its traceable proceeds.

77 But as is evident from our discussion above, this necessarily involves the examination of the nature of NFTs, and whether it could be considered

property. Given that the claimant had also pleaded that the defendant was liable for, amongst other things, breach of contract and the tort of conversion, it seemed that there were other strings to his legal bow when it came to applying for an injunction. To cite an example, in *Tullett Prebon (Singapore) Ltd and anor v Chua Leong Chuan Simon and others and another suit* [2005] SGHC 150 (“*Tullet*”), the case involved the enforcement of a “straightforward term as to when the employee in question should be permitted to tender his resignation” (at [9]). While the balance of convenience, including the difficulties of assessing damages, did not clearly weigh in either party’s favour, in granting the injunction, Justice Choo Han Teck took the view that the defendants should not be permitted to disregard the contract they had signed (*Tullet* at [7]).

78 Given that such points were not advanced before me, I express no conclusive view as to the merits of such an argument.

Whether the balance of convenience lay in favour of granting the injunction

79 Here, the claimant urged me to find that the balance of convenience lay in favour of granting the injunction. The counsel argued that the claimant would not be adequately compensated by an award of damages for the loss suffered if the defendant was allowed to transfer the Bored Ape NFT to other parties.⁵⁶ This was because the Bored Ape NFT was a very unique artwork, and the only one in existence.⁵⁷

80 While I agreed with that the balance of convenience lay in favour of granting the injunction, I would point out that, based on our brief explanation of what an NFT is (see [49]–[56] above), it is not quite accurate to describe the

⁵⁶ Claimant’s Written Submissions at para 32.

⁵⁷ Claimant’s Written Submissions at para 34.

Bored Ape NFT as a very unique artwork, and the only one in existence. The picture of the Bored Ape NFT exists as an image file which can be copied many times over. What is truly unique, and irreplaceable here is the string of code that represents the Bored Ape NFT on the blockchain. If that is transferred to third parties, the claimant might never be able to recover it, and so any proprietary remedy ordered by the court in relation to the Bored Ape NFT would be writ in water.

81 For the above reasons, I granted the proprietary injunction sought by the claimant.

Whether the application for substituted service out of jurisdiction should be granted

82 Having found that the Singapore court was the appropriate court to hear this action, I would have granted leave for service out of jurisdiction under O 8 r 1. The claimant, however, applied for substituted service out of jurisdiction owing to the unique circumstances of the case.

83 Under the ROC 2014, substituted service was provided for in O 62 r 5 which stated:

Substituted service (O. 62, r. 5)

5.—(1) If, in the case of any document which by virtue of any provision of these Rules is required to be served personally on any person, it appears to the Court that it is impracticable for any reason to serve that document personally on that person, the Court may make an order in Form 136 for substituted service of that document.

(2) An application for an order for substituted service must be made by summons supported by an affidavit in Form 137 stating the facts on which the application is founded.

(3) Substituted service of a document, in relation to which an order is made under this Rule, is effected by taking such steps

as the Court may direct to bring the document to the notice of the person to be served.

(4) For the purposes of paragraph (3), the steps which the Court may direct to be taken for substituted service of a document to be effected include the use of such electronic means (including electronic mail or Internet transmission) as the Court may specify.

84 Under the ROC 2021, O 8 r 2 provides for the various methods of service out of Singapore. It states:

Methods of service out of Singapore (O. 8, r. 2)

2.—(1) Where the Court’s approval has been obtained under Rule 1(2), service of the originating process or other court documents may be effected out of Singapore in the following manner:

- (a) according to the manner contractually agreed between the parties;
- (b) where there is a Civil Procedure Convention governing service in the foreign country, according to the manner provided in that convention;
- (c) through the government of the foreign country if that government is willing to effect service;
- (d) through the judicial authority of the foreign country if that authority is willing to effect service;
- (e) through a Singapore consular authority in that foreign country;
- (f) according to the manner provided by the law of that foreign country.

(2) Unless any Civil Procedure Convention, treaty, government or judicial authority of a foreign country requires that the originating process or other court documents be sent from the Government or judicial authority of Singapore, they may be sent to the entities in paragraph (1)(c), (d) and (e) by the serving party who must engage a solicitor for this purpose.

(3) Where the originating process or other court documents have to be sent from the Government of Singapore, the solicitor for the serving party must send them to the Registrar with a letter requesting the Registrar to forward them to the Ministry of Foreign Affairs stating the method of service in the foreign country.

(4) Every originating process or court document which is to be served outside Singapore must be accompanied by a translation in the official language of the foreign country, and if there is more than one official language, in any of those languages which is appropriate for the party to be served, except where the official language or one of the official languages is English.

(5) The translation must be certified by a person qualified to do so and the certificate must contain the translator's full name, his or her address and his or her qualifications.

(6) Nothing is to be done under this Rule that is contrary to the laws of the foreign country.

85 It is clear, from a brief glance at O 8 r 2, that there does not appear to be a provision allowing for substituted service out of Singapore. Where service in Singapore is concerned, however, O 7 r 7 states:

Substituted service (O. 7, r. 7)

7.—(1) If a document is required to be served personally and it is impractical to serve it personally, a party may apply to serve it by substituted service.

(2) The Court may order any method of substituted service that is effective in bringing the document to the notice of the person to be served, including the use of electronic means.

(3) Substituted service is to be effected within 14 days after the order of the Court.

86 The fact that O 7, which deals with service within Singapore, provided for substituted service, and O 8, which deals with service out of Singapore, had no comparable provision, suggested at first blush, that I did not have the power, under the ROC 2021, to allow for substituted service out of Singapore. I therefore directed the claimant to further address me on this point.

87 The claimant argued that the court did retain the discretion to allow substituted service out of Singapore under the ROC 2021. Here, O 8 r 2(1) prescribed a “non-exhaustive list of ways in which originating processes and

court documents [could] be served out of Singapore”.⁵⁸ This was because O 8 r 2(1) omits the use of imperative language, and merely states that “service of the originating process or other court documents *may* be effected out of Singapore in the following manner”. Further, O 8 r 2 did not prescribe a closed list given that between O 8 r 2(1)(e) and O 8 r 2(1)(f), the word “or” between these two sub-provisions was not used. In contrast, other provisions in the ROC 2021 appeared to prescribe a closed list, for example, O 6 r 1(3) which states:

Mode of commencing proceedings (O. 6, r. 1)

(3) A claimant must commence proceedings by an originating application where —

- (a) these Rules or any written law require it;
- (b) the proceedings concern an application made to the Court under any written law; **or**
- (c) the proceedings concern solely or primarily the construction of any written law, instrument or document or some question of law and the material facts are not in dispute.

[emphasis in bold]

88 I agreed with this analysis. In my view, O 8 r 2(1) did not appear to prescribe a closed list as to how service of the originating process or other court documents could be effected out of Singapore. This conclusion is bolstered by the observations made by the drafters of the ROC 2021 in the Civil Justice Commission Report (29 December 2017), Chapter 6: Service out of Singapore which stated:

Scope

1 This Chapter sets out the provisions governing service of originating processes and other court documents out of

⁵⁸ Claimant’s Further Submissions at para 4.

Singapore. It largely retains the existing Order 11 with a simplification and rearrangement of its provisions.

Service out of Singapore with Court's approval

2 Instead of enumerating all the permissible cases for service of an originating process out of Singapore, Rule 1(1) prescribes the criteria for **obtaining the Court's approval for service out of Singapore, namely showing** that the Court has the jurisdiction or is the appropriate court to hear the case. This makes it unnecessary for a claimant to scrutinise the long list of permissible cases set out in the existing Rules in the hope of fitting into one or more descriptions. It also avoids the possibility that a particular category of cases which could and should be heard in Singapore is actually not in the list.

89 What is clear is that the ROC 2021 was not intended to drastically change the regime relating to jurisdiction in general, and the service of originating processes or other court documents out of Singapore. Rather, the intention was to simplify things, for example, by obviating the need for a claimant to scrutinise a list of cases in which service out of Singapore is permissible.

90 As a final point, the power of the court to allow substituted service out of jurisdiction is one of considerable vintage (see, eg: *Porter v Freudenberg* [1915] 1 KB 857 at 889) having been expressed in O 62 r 5 of the ROC 2014 (see, eg: *Petroval SA v Stainby Overseas Ltd and others* [2008] 3 SLR(R) 856; *Consistel Pte Ltd and another v Farooq Nasir and another* [2009] 3 SLR(R) 665; *Storey, David Ian Andrew v Planet Arkadia Pte Ltd and others* [2016] SGHCR 7). If the drafters of ROC 2021 had intended to curtail the court's power in such a radical fashion, there would have been express and specific language to that effect.

91 In the present case, bearing in mind the Ideals set out in the ROC 2021, I was satisfied that leave should be given for substituted service out of

jurisdiction. To find otherwise would be to deprive the claimant of the only practical manner of effecting service on the defendant.

Conclusion

92 In the circumstances, I allowed the application, and granted an order in terms of the prayers sought (see [25] above). I also granted leave to share the injunction papers with certain entities for the purposes of enforcing it.

Lee Siu Kin
Judge of the High Court

Shaun Leong, Rachel Koh and Theodore Ang (Withers Khattar Wong
LLP) for the claimant.
The defendant absent and unrepresented.
