COURT FILE NO.: CV-23-00092340-00CP
DATE: 2023/06/19

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Taylan McRae-Vu, Plaintiff

AND:

Profitly Incorporated, DMCB Holdings Inc., Ivan Avramenko, Alexandra Stinson, and John Doe, Defendants

BEFORE: Hooper J.

COUNSEL: Sohaib Mohammad for the Plaintiff

HEARD: June 15, 2023

ENDORSEMENT

[1] This is a proposed class proceeding brought by a purchaser of non-fungible tokens developed by a group that call themselves "The Boneheads". The plaintiff seeks compensation for damages suffered by purchasers of a specific series of NFTs minted by the Boneheads and released in August 2021, which, according to the plaintiff, constituted a fraudulent scheme. It is a civil claim based in breach of contract and fraudulent misrepresentation.

[2] The motion before me is for an *ex parte Mareva* Injunction against the defendants to freeze a number of crypto wallets and bank accounts that are owned by the defendants.

[3] As explained by RSJ MacLeod in *Li et al. v. Barber et al.,* 2022 ONSC 1176:

> *Ex parte* means without notice. It stands in stark contrast with another Latin phrase that was recently in the news, *audi alterem partem.* The latter is a fundamental principle of justice. It means that no decision should be made without all parties being heard. It is a central tenet of our legal system. As such, although motions without notice are sometimes necessary and justified, any such order is made on a temporary basis pending a hearing of all sides of the issue. Pursuant to Rule 40.02 of the *Rules of Civil Procedure,* an injunction granted without notice is for a maximum of ten days. When the motion returns, the opposing parties must be put on notice and will have an opportunity to oppose the order or the continuation of the injunction.

[4] There is a stringent test for an injunction whether with or without notice. A *Mareva* injunction, seeking to freeze assets of a defendant without any initial opportunity to respond, has an even higher bar to meet.

[5] At the conclusion of the hearing on June 15, 2023, I was persuaded by the evidence and by submissions of counsel that this was a case that justified the requested injunction. This injunction

is temporary and will expire on June 26, 2023, if not renewed or extended after a hearing on notice. Time has been set aside on June 23, 2023 at 10:00 a.m. for that hearing, to proceed virtually.

[6] I signed the injunction order with reasons to follow. These are those reasons.

Background

[7] Non-fungible tokens (NFTs) are assets that have been tokenized via a blockchain. They are assigned unique identification codes and metadata that distinguish them and make them unique. They cannot be replicated. They can be traded for money, cryptocurrencies, or other NFTs. Cryptocurrencies are tokens as well; however two cryptocurrencies from the same blockchain are interchangeable – they are fungible.

[8] NFTs are created through a process called minting, in which the information of the NFT is recorded on a blockchain. As tokens are minted, they are assigned a unique identifier directly linked to one blockchain address. Each token has an owner, and the ownership information is publicly available. Two NFTs from the same blockchain can look identical, but they are not interchangeable. Their value is not necessarily equivalent and will be set by the market.

[9] In 2021, the NFT market experienced a surge of liquidity with, at some points, hundreds of NFT collections launching daily across a number of blockchains. This surge in popularity created an extremely competitive environment. Developers began to offer more than just an NFT. "Member-only" perks (called "utility" in the NFT forum) started to be advertised. Developers set out when those perks would be available through a "roadmap".

[10] The launch of a newly minted series of NFTs, if marketed well, can garner significant excitement by NFT consumers. The 10,000 Bonehead NFTs at issue in this case sold out in forty minutes for a cash influx to the Boneheads of over $4,000,000 CAD. The promises made in advance of the release included the following perks:

(a) Owning a #BONEHEAD grants you a lifetime membership (as long as you hold it in your wallet) to the Cabana, the forging HQ, where you will be able to forge physical and digital collectibles.

(b) Our business model is mint + forge. You will be able to forge physical collectibles (grails, clothing, accessories, and more) of the digital representations that we release through NFTs through the Cabana.

(c) Only token holders will be able to participate in the exclusive drops that we release.

(d) NFT post-sale physicals including mousepads, area rugs, and paintings

(e) Token holders will be the first to have an opportunity to access and test our consumer-facing avatar creation app during the beta release. This app will allow you to create a personal avatar for yourself using an expansive catalog of clothing and accessories to suit your unique style.

[11] In addition to these promises, the Boneheads promised token holders the following giveaways:

(a) All token holders have an opportunity to participate in a secondary credit sale for a chance to win $1 million.

(b) One random token holder to receive a mystery box valued at $250,000 with the identity of that token holder to be revealed instantly at the end of the mint (i.e. launch) of the Boneheads NFT.

[12] The plaintiff is one of the original purchases of the Boneheads NFT after it opened for public minting on August 20, 2021.

[13] As stated above, the initial mint of the Boneheads 10,000 NFTs took forty minutes to sell out. Almost immediately afterward, red flags began to appear. The Bonehead team stopped being responsive to consumer inquiries, announcing that they would be off-line for several days. In the world of NFT's, suddenly being unreachable to consumers immediately after the close of the NFT series' mint is viewed as evidence of a rug pull. A rug pull is when the team launching the NFT takes the funds generated from the initial mint without delivering on any of the promises made to the consumers.

[14] The evidence before me indicates that none of the promised perks were delivered in the nearly two years since the Bonehead series was launched. Consumers have been left with NFTs that appear to be worthless. The moving party has framed this litigation as one of consumer protection.

The Test for a Mareva Injunction

[15] In order for the court to impose a *Mareva* injunction the party seeking the injunction must satisfy the court of the following things:

(a) the plaintiff must also show that he or she has a strong *prima facie* case;

(b) the plaintiff must make full and fair disclosure of all material matters within his or her knowledge;

(c) the plaintiff must give particulars of the claim against the defendant, stating the grounds of the claim, the amount thereof, and the points that could be fairly made against it by the defendant;

(d) the plaintiff must give the basis for believing that the defendant has assets in the jurisdiction;

(e) the plaintiff must give grounds for believing that there is a real risk of the assets being removed out of the jurisdiction, or disposed of within the jurisdiction, or otherwise dealt with so that the plaintiff will be unable to satisfy a judgment awarded to him or her; and

(f) the plaintiff must give an undertaking as to damages.

See: *Benarroch, supra; Farah v. Sauvaeau Holdings Inc.,* 2011 ONSC 1819; *Sibley & Associates v. Ross*, (2011) 106 O.R. (3d) 495 (SCJ); *SFC Litigation Trust v. Chan,* 2017 ONSC 1815 para. 17' and *Chitel v. Rothbart* (1982) O.R. (2d) 513 (CA).

[16] The factors outlined above are guidelines for the Court to consider as opposed to rigid criteria each of which must be met before the *Mareva* will issue. The Court, under Section 101 of the *Courts of Justice Act*, should ask whether it is just and equitable that a *Mareva* should issue: see *SFC Litigation Trust, supra*.

[17] The elements for a claim of fraudulent misrepresentation based in contract require:

(1) A false representation by the defendant

(2) The defendant's knowledge of the falsehood of that representation

(3) The false representation caused the plaintiff to act

(4) The plaintiff's actions result in a loss

[18] On the extensive record before me, the plaintiff has a strong *prima facie* case that the Boneheads made a fraudulent misrepresentation that induced individuals such as the plaintiff into purchasing their NFT series.

[19] The corporate defendants are both Canadian corporations with registered business addresses in Belleville, Ontario. The two named defendants have their addresses listed in Belleville as well; however, there is no evidence that any of the defendants have assets in Ontario. I am being asked to freeze crypto wallet, a type of asset that is not within any jurisdiction. Ontario courts have already accepted that this type of asset can be the subject of a *Mareva* Injunction: *see Li v. Barber. et al.* 2022 ONSC 1176

[20] The plaintiff acknowledges that there is not yet sufficient evidence of a real risk of the dissipation of these assets; however, in cases of fraud, as in any case, the *Mareva* requirement that there be risk of removal or dissipation can be established by inference, as opposed to direct evidence, and that inference can arise from the circumstances of the fraud itself, taken in the context of all the surrounding circumstances. As stated in *Sibley & Associates LP v. Ross,* 2011 ONSC 2951 at para. 63:

> It is not necessary to show that the defendant has bought an air ticket to Switzerland, has sold his house and has cleared out his bank accounts. It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff.

[21] In this case, a large portion of the funds received from the minting of this series have been moved to centralized exchanges. I have been advised that once moved to these exchanges, further transfers are untraceable.

[22] I was concerned and I challenged the plaintiff on overreach. There is no evidence of any connection between the alleged fraud and the traditional bank accounts held by the defendants. I refused to grant an injunction that extended to those bank accounts. In addition, while there has been extensive tracing of the funds to identify the specific crypto wallets in the order, I am concerned an innocent party may be caught up in this in error. The plaintiff has agreed that if contacted, reasonable efforts will be made to release any wallet that is not owned or controlled by the defendants.

[23] In any event, the return of this matter has already been set for June 23, 2023 to ensure an expeditious review of any unintended impact this order may have and to allow the defendants an ability to be heard.

Undertaking as to Damages

[24] Rule 40.03 of the *Rules of Civil Procedure* R.R.O. 1990 Reg. 194 requires the moving party to provide an undertaking as to damages unless the court orders otherwise. The following sections of Rule 40 are applicable to this application:

> 40.01 An interlocutory injunction or mandatory order under section 101 or 102 of the *Courts of Justice Act* may be obtained on motion to a judge by a party to a pending or intended proceeding.
>
> 40.03 On a motion for an interlocutory injunction or a mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

[25] In his text, *Injunctions and Specific Performance*, loose-leaf, (Toronto: Thomson Reuters, 2021) Sharpe J.A. (as he then was) wrote the following in terms of the need for an undertaking starting at page 2-64:

> Concomitant with the question of irreparable hard is the requirement of the plaintiff's undertaking in damages. It is well established that, as a condition of obtaining an interlocutory injunction, the plaintiff must give an undertaking to pay to the defendant any damages that the defendant sustains by reason of the injunction, should the plaintiff fail in the ultimate result. The English courts have held that the undertaking in damages is implicit and will be enforced even if not included in the order unless the contrary was argued and expressed at the time. However, an Ontario decision holds that the plaintiff must give an explicit undertaking by way of affidavit in the absence of which an interlocutory injunction may be refused even where an oral undertaking is given by counsel at the hearing. The rationale for the undertaking is to protect the defendant from the risk of granting a remedy before substantive rights have been determined.

[26] The moving party relies on the decision of *Li, supra* at para. 38 for the proposition that a court may waive undertakings in cases that have broad public interest significance. Framing this litigation as one of consumer protection for a prospective class of litigants, I accept that without a waiver of this undertaking, the plaintiff would be unable to continue in this proceeding: *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.* 2006 BSCS 1018 at para. 106.

[27] For the purposes of this *ex parte* hearing, the undertaking will not be required. I will revisit this issue at the full hearing of this matter.

Substituted Service

[28] The plaintiff seeks alternative means of service including service by email, Facebook Marketplace, Instagram and Twitter. Those modes of service have already been allowed with increasing frequency by Canadian courts and I will allow those modes of service with respect to the motion material and order.

[29] In addition to email and social media platforms, the plaintiff seeks to serve the owners of the frozen crypto wallets by creating unique NFT images of each page of the order and "air dropping" those NFTs into the crypto wallet. I am advised that the owners of the wallets would then see those images and have notice of the order. This form of service has already been approved in New York State and the United Kingdom: *see LCX AG v. John Doe Nos. 1-25,* N.Y. Supreme Ct., Index No. 154644/2022 at p. 2; *D'Aloia v. Persons Unknown & Others*, [2022] EWHC 1723 (Ch) at para. 39.

[30] The purpose of allowing substituted service is to bring the proceedings to the attention of the party sought to be served. Because of the anonymity afforded by blockchains, allowing service through the airdropping of NFTs with the pages of the order is the best way to ensure the owner of that crypto wallet has been given notice. In addition, a hyperlink will also be provided in an NFT to a website housing the full motion material.

[31] There are three ways in which the court can be satisfied that the crypto wallet owners have, in fact, received the documents: (a) if the owner "hides" the NFT from public view; (b) if the owner transfers the NFT out of their wallet, or (c) if the owner clicks on the hyperlink and is recorded as visiting the website with the full motion material.

[32] At the return of this hearing, the plaintiff must provide specific details in relation to the service on each defendant and each crypto wallet.

Conclusion

[33] The temporary injunction is granted for ten days commencing June 15, 2023.

[34] In addition to serving the orders as set out above, counsel for the plaintiff will have to provide a notice of motion to extend the injunction if he proposes to do so. Counsel should ensure that specific details as to the service on each defendant and crypto wallet is within that motion record.

[35] I have made time available for the purpose of that motion on June 23, 2023 at 10:00 a.m.

Justice J. Hooper

Date: June 19, 2023