Singapore High Court Rules That NFTs Constitute Property For Purposes Of Injunction

William Blackstone once remarked that "*[t]here is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property*".[1] Blackstone's prescient comments continue to hold true in the present day. The General Division of the High Court (**High Court**), in *Janesh s/o Rajkumar v Unknown Person (CHEFPIERRE)* [2022] SGHC 264 (***Janesh***), explored the novel issue of whether non-fungible tokens (**NFTs**) give rise to proprietary rights that could be protected by an injunction and, in granting an interim proprietary injunction restraining the defendant (**Defendant**) from dealing with an NFT, found that they do.

Background

The claimant (**Claimant**) was the owner of what he claimed to be a one-of-a-kind, unique and irreplaceable NFT known as the Bored Ape Yacht Club (**BAYC**) ID #2162 (**Bored Ape NFT**). NFTs within the BAYC collection were popular and owned by a number of celebrities. Each such NFT was minted on the Ethereum (**ETH**) blockchain with a unique hash number recorded on the blockchain together with a unique token ID which served as publicly verifiable proof of its provenance.

The Claimant was a regular user on NFTfi, a community platform functioning as an NFT-collateralised cryptocurrency lending marketplace. He would often enter into loan transactions with other users to borrow cryptocurrency, using NFTs as collateral. One such NFT was the Bored Ape NFT. The Claimant took special care when using the Bored Ape NFT. He only dealt with reputable lenders, and insisted on certain terms being part of the loan agreements, including crucially, a term specifying that 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 had previously borrowed 45 ETH from the Defendant and repaid the same without incident. The Claimant then entered into another loan — the subject of the dispute — on 19 March 2022 with the Defendant for 150,000 DAI (another cryptocurrency), with the loan period being for 30 days. On 17 April 2022, the Claimant told the Defendant that he required a short extension of time to repay the loan. The Defendant agreed to this and assured the Claimant that the Bored Ape NFT would be returned to him once the loan was repaid in full. Two days later on 19 April 2022, the Defendant agreed to enter into a refinancing loan with the Claimant, pursuant to which the Claimant would take out a new loan with the Defendant with the Bored Ape NFT as collateral; and the Defendant would then deduct the outstanding amount owed from the 150,000 DAI loan from fresh funds provided to the Claimant (from a separate loan from another user).

The Defendant, however, subsequently changed his mind and issued an ultimatum stating that he would not extend any refinancing loan, and that he would "foreclose" if the 150,000 DAI loan was not fully repaid by 21 April 2022. The Claimant was unable to find sufficient funds to repay the loan and the Defendant "foreclosed", with the result that the Bored Ape NFT was transferred from NFTfi's escrow account into the cryptocurrency wallet of the Defendant. The Claimant made part-payment of the loan and reminded the Defendant of the terms of their agreement, but the Defendant informed the Claimant that he would be keeping the Bored Ape NFT, returned the part-payment, and prevented the Claimant from making further

[1] William Blackstone, Commentaries on the Laws of England 2 (Oxford 1766).

payments. The Defendant listed the Bored Ape NFT for sale on OpenSea (an online NFT marketplace) and, according to the Claimant, a number of offers were made for the Bored Ape NFT.

The Claimant therefore, among other things, commenced legal proceedings against the Defendant and made an urgent application for an interim proprietary injunction restraining the Defendant from dealing in any way with the Bored Ape NFT until after trial.

The High Court's Decision

The High Court granted an interim proprietary injunction restraining the Defendant from dealing with the Bored Ape NFT until after trial and, in doing so, found that the Claimant had a seriously arguable case that NFTs in general were capable of giving rise to proprietary rights which could be protected by an injunction.

There were, however, competing propositions from two lines of cases:

(a) First, that English law only recognises two kinds of property, choses in possession and choses in action, there being (in)famously "*no* tertium quid[2] *between the two*" (per Fry LJ in *Colonial Bank v Whinney* [1885] 30 Ch.D 261 (***Colonial Bank***)); and

(b) Second, that there are four criteria that must be met for something to be considered as property — 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*" (**Ainsworth Criteria**, per Lord Wilberforce in the eponymous case of *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175).

Under the dichotomy of *Colonial Bank*, cryptocurrency (and NFTs) are neither choses in possession nor choses in action — and there being no "tertium quid" outside of these two categories, cryptocurrency (and NFTs) are not property.

Faced with the two competing propositions, the High Court applied the Ainsworth Criteria, reasoning that the applicability of *Colonial Bank* had not been advanced before the court.

The High Court found that NFTs *did* satisfy the Ainsworth Criteria:

(a) Metadata is central to an NFT, and this same metadata distinguishes one NFT from another;

(b) NFTs are "excludable" in that one cannot deal with an NFT without the private key of the owner;

(c) An owner of an NFT has the exclusive ability to transfer NFTs to another party, and NFTs are clearly the subject of active trading; and

(d) NFTs have as much permanence and stability as money in bank accounts.

Notwithstanding the foregoing, the High Court made some *obiter* comments and observations of note.

First, the High Court noted that both an English decision (*AA v Persons Unknown who demanded bitcoin on 10th and 11th October 2019 and ors* [2019] EWHC 3556 (Comm)) and a Legal Statement published by the UK Jurisdiction Task Force (entitled "Legal Statement on Cryptoassets and Smart Contracts") highlighted that the scope of property was not in issue in *Colonial Bank* and that *Colonial Bank* should not be regarded

[2] That is, no third category.

as part of the reasoning leading to its decision. The High Court also observed that it was unclear whether Fry LJ intended the corollary that an intangible thing is not property if it is not a thing in action, and that *Colonial Bank* should therefore not to be treated as limiting the scope of what kinds of things could be property in law.

Secondly, the High Court drew attention to the support, in both cases and academic writings, that the term "*choses in action*" goes beyond the literal meaning of mere "*rights enforceable by action*", and may be said to be co-extensive with intangible property.

Concluding Observations

Janesh is unlikely to be the last word on whether NFTs (and cryptocurrency) can constitute property and, if so, how they ought to be categorised (if they are to be categorised at all), particularly as *Janesh* was heard *ex parte*, with the Claimant only needing to show a seriously arguable case for the purposes of the grant of an interim proprietary injunction, and the High Court expressly stating that a "*different conclusion may well be reached with the benefit of fuller submissions*".

That having been said, it does appear that the weight of both authority and principle leans in favour of the Singapore courts recognising NFTs and cryptocurrency as property, with one example being the Court of Appeal decision of *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20[3] where it was held that there was "*much to commend the view that cryptocurrencies should be capable of assimilation into the general concepts of property.*"

Sundaresh Menon CJ has commented, extra-curially, that "*the overriding narrative of Singapore law has been that of fidelity to the pillars of the English common law without being hidebound by its dogma*"[4] — and this is certainly one *milieu* where it would be surprising for Singapore law to be hidebound to a dogmatic dichotomy from *Colonial Bank*, a 19th century English decision that precedes the advent of digital computers, the internet, cryptocurrency, crypto assets, and NFTs. One awaits the next decision on this issue with baited breath.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or the following Partner:

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[3] A matter in which the author was involved in successfully representing the respondent.
[4] Sundaresh Menon CJ, "The Somewhat Uncommon Law of Commerce" (2014) 26 SAcLJ 23 at [48].

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