Neutral Citation Number: [2024] EWHC 168 (Comm)

Claim No: LM-2022-000039

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 31 January 2024

Before :

MR ANDREW HOCHHAUSER KC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

AMIR SOLEYMANI

Claimant

- and -

NIFTY GATEWAY LLC

Defendant

- -

The Claimant did not appear and was not represented

Mr Andrew Feld (instructed by Enyo Law LLP) for **the Defendant**

- -

Hearing dates: Monday 22 (reading) and Tuesday 23 January 2024

- -

APPROVED JUDGMENT

The Judge directs that pursuant to CPR PD 29A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This Judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 09:30 on Wednesday 31st January 2024.

MR ANDREW HOCHHAUSER KC:

Introduction

1. This is the trial of a Counterclaim by the Defendant, Nifty Gateway LLC, against the Claimant, Mr Amir Soleymani, for an alleged contractual debt of US$650,000, arising from an online auction conducted between 30 April and 2 May 2021 (the "**Auction**"), in relation to 100 numbered Non-Fungible Tokens ("**NFTs**") associated with the digital artwork "ABUNDANCE" by an artist known as "Beeple", hosted on the Defendant's platform known as "Nifty Gateway". As will be seen, there has been quite a complicated procedural background to this matter and Mr Soleymani, as Claimant, has asserted a "defence" by way of a positive claim for declarations of non-liability to the Defendant. For reasons which I will later explain, the Claimant's Claim and Defence to Counterclaim was struck out, following non-compliance with an Unless Order of HHJ Pelling KC dated 20 December 2023.

Representation

2. The Defendant was represented by Mr Andrew Feld. I am grateful to him for his helpful oral and written submissions. The Claimant did not appear and was not represented, his former solicitors, Russells, having ceased to act, upon obtaining an Order from HHJ Pelling KC dated 28 November 2023, pursuant to CPR 42.3. I am told that the Claimant has now relocated to Dubai. Paragraph 6 of his second witness statement made on 13 October 2023, states "*I moved from Liverpool to Dubai in January 2023, and I now live in Dubai.*" That statement and his third witness statement dated 26 October 2023 give as his address Apartment 6503, Boulevard Point, Downtown Dubai, Dubai, UAE.

3. After much activity on his part, as described below, he has ceased to engage in these proceedings.

The Procedural History

4. Shortly stated, the procedural history is as follows:

   (1) The Defendant originally asserted its claim for payment against the Claimant in July 2021 by commencing a Judicial Arbitration and Mediation Services ("**JAMS**") arbitration, seated in New York **(**the **"NY Arbitration"**), pursuant to the arbitration agreement in its Terms of Use.

   (2) The Claimant then commenced these English proceedings on 9 September 2021, in order to prevent the NY Arbitration taking place. Originally, he did not seek a declaration of non-liability or otherwise advance a case on the substantive dispute but sought instead only to invalidate the arbitration agreement and governing law clause in the Terms of Use. His position was that those clauses were unenforceable under English consumer law.

   (3) On 24 March 2022, the Defendant succeeded at first instance before Ms Clare Ambrose (sitting as a Deputy High Court Judge) in having the Claimant's (then) case dismissed for want of jurisdiction or stayed under s.9 of the Arbitration Act 1996. The case is reported is at [2022] EWHC 773 (Comm). That decision was partially reversed by the Court of Appeal in a judgment handed down on 6

October 2022. That decision is reported at [2022] EWCA Civ 1297. The Court of Appeal ordered a trial in England of the consumer law issues regarding the validity or effectiveness of the arbitration agreement for the purposes of s.9 of the Arbitration Act 1996.

(4) In order to strengthen his position on jurisdiction before the Court of Appeal, the Claimant undertook for the first time to amend to plead a case for relief regarding his underlying substantive liability to the Defendant. He made that amendment in February 2023, which resulted in the wide-ranging "defence" to liability in the Particulars of Claim.

(5) In light of this amended pleading, the Defendant decided to agree to a trial of the substance in England instead of the NY Arbitration, in order to avoid the expense of an interim trial on the validity of the arbitration agreement. That resulted in: (1) the Defendant pleading its claim for payment by way of the Defence and Counterclaim; (2) the NY Arbitration being withdrawn; (3) a further round of amendments to the pleadings by which consumer law issues concerning the validity of the arbitration agreement and governing law clause were removed. That further round of amendments resulted in the pleadings contained in the trial bundle;

(6) Following a directions hearing on 24 April 2023, the trial was listed to commence on 23 January 2024 with an estimate of 7 days, together with a day's pre-reading. A further CCMC took place on 16 June 2023;

(7) As stated earlier, the Claimant's solicitors ceased to act on 29 November 2023. The Claimant refused to provide any address for service. As a result, on 8 December 2023, the Defendant obtained an order permitting it to serve the Claimant by email;

(8) The Defendant did not respond to those emails and refused to engage with trial preparation or any other aspect of the proceedings. Therefore, on 20 December 2023, the Defendant obtained an unless order designed to put him to his election as to whether he wished to proceed (the **"Unless Order"**). The Unless Order provided that, unless the Claimant took certain steps to engage by 4.30pm on 8 January 2024, his Claim and Defence to Counterclaim would be struck out. That was sealed and served on him on 21 December 2023;

(9) The Claimant failed completely to comply with the conditions in the Unless Order, with the result that his Claim and Defence to Counterclaim have been struck out. The effect of that non-compliance is that the strike out sanction in the order applied automatically and without further order: CPR 3.4.19, PD3A para 1.6. This has considerably narrowed the issues in the trial;

(10) On 10 January 2024, the Defendant's solicitors, Enyo, wrote to the Court to this effect and on 15 January 2024, the Court ordered that the trial time estimate be reduced to up to a day and half a day's pre-reading. In the event the hearing occupied a full day.

The Result of the Strike-Out of the Claim and Counterclaim

5. While the Defendant would have been entitled to request what would effectively be a default judgment under CPR 3.5(2), the Defendant wishes to proceed with a trial of the merits of the claim. It does so primarily because of the potential difficulties in enforcing a default judgment against the Claimant in Dubai.

6. The Defendant is still required to prove its Counterclaim and demonstrate that it is entitled to the relief that it seeks: see CPR 39.3.4 (in the context of the identically worded sanction under CPR 39.3(1)(b) when a claimant does not attend trial).

7. In that regard, although the Claimant may not rely on his pleaded case, the Court may still have regard to his pleadings in order to understand the Defence and Counterclaim and to understand the ambit of the dispute between the parties, and therefore the case that needs to be proved by the Defendant. In particular, the Defendant is entitled to the benefit of any admissions made by the Claimant or other matters of common ground in order to narrow the case it has to prove: ***Thevarajah v Riordan*** [2015] EWCA Civ 41 at [33] per Tomlinson LJ.

The Power to Proceed in the Claimant's Absence

8. The Court has the power to proceed in the Claimant's absence under CPR 39.3(1). In my judgment it was plainly appropriate so to do and I granted permission for the trial to proceed in the absence of the Claimant for the following reasons:

    (1) The Claimant has not provided any reason, explanation or excuse for his disengagement or his failure to attend trial, nor has he expressed any desire to attend or be heard;

    (2) The Claimant is plainly on notice of the trial date. The trial was listed in May 2023, at a listing hearing attended by his representatives, many months before Russells ceased to act;

    (3) The Defendant's solicitors have informed the Claimant of all the steps that have been taken, and all correspondence with the Court, by email since Russells ceased to act. There is no reason to think that the Claimant has not received the emails sent to him, which is the same as that used by Russells to serve him with the CPR 42.3 order. Enyo Law LLP has not received any bounce-back from Mr Soleymani's email address;

    (4) The Claimant is protected by his right to apply to set aside any judgment made against him under CPR 39.3(3).

The Defendant's Duties in the Claimant's Absence

9. Despite the fact that the trial was heard in the Claimant's absence, the Defendant was under a duty of fair presentation: see the decision of Bryan J in ***Qingdao Huiquan Shipping v Shaghai Don He Xin*** [2018] EWHC 3009 (Comm); [2019] 1 Lloyd's Rep 520 at [25]-[26] and Mr Christopher Hancock QC (as he then was) in ***Longulf Trading v Niyazi Onen Gida*** [2019] EWHC 1573 (Comm) at [3]-[4]. The duty is not one of full and frank disclosure but requires a party attending to: (1) present the case fairly; and

(2) identify factual or legal points for the benefit of the non-attending party, including points which might have been taken had he appeared before the Court.

10. I consider that Mr Feld on behalf of the Defendant has fully complied with those obligations. He has presented the case fairly and I have been taken carefully through the evidence. I do, however, also accept his submission that the obligation is more limited than it would otherwise have been had the Claimant's entire case not been struck out. In particular, the duty does not extend to drawing the Court's attention to and responding to the Claimant's various **positive** allegations of fact and law in his pleadings as to why he is not liable to the Defendant because:

    (1) Those are not points that the Claimant would be entitled to take even if he were present; and

    (2) Were the Defendant required to do so, that would substantially undermine the purpose of the Unless Order, which was sought, and granted, on the basis that it should not have to incur the wasted expense of preparing to respond to a case that was not being pursued. Hence the substantial reduction in the length of the hearing;

11. The duty is therefore limited to raising points about the issues relating to the Defendant's own factual or legal case (including but not limited to points of that character in the Claimant's pleaded case) which the Claimant might have wished to take had he appeared.

The Status of the Claimant's witness statements

12. The Claimant has served three witness statements for trial. However:

    (1) By CPR 32.5(1), the Claimant is not entitled to rely on those statements without tendering himself to give oral evidence, unless he has put those statements in as hearsay evidence;

    (2) The Claimant has not given notice to put in his statements as hearsay evidence under CPR 33.2(2). In particular, he has not offered any reason why he will not give evidence.

13. It follows that the Claimant's written evidence is not part of the evidence in the trial and the Court is not obliged to consider it: ***Williams v Hinton*** [2011] EWCA Civ 1123 at [42]-[46] per Gross LJ. That is so quite apart from any questions as to the admissibility and weight of the evidence under the Civil Evidence Act 1995 and CPR Part 33.

14. Apart from the reference to the Claimant's present address, I have not taken into account any of the contents of the Claimant's three witness statements.

15. The Claimant also served an expert witness statement from a Mr Ulrich Gall, the parties having been granted permission to rely on the evidence of an expert in the "structure and operation of auctions" on the issue of whether the term "ranked auction" was a term of art with a commonly understood meaning. That issue went to the Claimant's case, now struck out, that the rules of the Auction were "onerous and unusual" and therefore not incorporated. In the light of the content of Mr Gall's report, the Defendant elected

not to rely upon any expert evidence of its own. No reference to it was made during the course of the trial, although there was one reference to it in relation to incorporation of terms at paragraph 73(a) of Mr Feld's written submissions.

The Defendant's witness statements

16. The Defendant has served two witness statement from Mr Alex Ryan Nadler, the Defendant's Trust & Safety Manager, who is based in New York. His first statement is dated 13 October 2023 (**"Nadler 1"**) and his second statement is dated 25 October 2023 (**"Nadler 2"**). On 17 January 2024, the Defendant filed a hearsay notice for Mr Nadler's statements, on the basis that it would be disproportionate for him to attend trial when he was not going to be cross-examined and his evidence therefore not challenged.

17. On 13 October 2023, the Defendant also served hearsay notices, relying on hearsay evidence from two witnesses who gave evidence by way of depositions in the NY Arbitration, but who could not be called as witnesses for trial because they are no longer employed by the Defendant, and are located outside the jurisdiction:

    (1) Mr Patrick McLaren, the former COO of the Defendant. He made two certifications in the NY Arbitration, on 29 September 2021 and 7 February 2022, respectively and he also gave evidence in a deposition therein on 22 July 2022;

    (2) Mr Tommy Kimmelman, the Defendant's former Head of Artist Relations. He also gave evidence in a deposition therein on 21 July 2022.

The Background

18. The background is as follows:

    (1) The Defendant is a company based in the USA, which operates the Nifty Gateway platform. Nifty Gateway is an NFT marketplace which facilitates sales on so-called "primary" and "secondary" markets. In the primary market, which is the one relevant to this case, the Defendant effects the first sale of NFTs on behalf of "creators" (i.e. artists), and collects payment which is then transferred to the creator, less commission;

    (2) Sales of NFTs on the primary market are effected by a variety of methods known as "drops". "Drops" include auctions in a range of formats, such as a "traditional auction", a "silent auction" and a "ranked auction". In the first one, there is only one successful bidder, whereas in a "silent auction" or "ranked auction" on the Nifty Gateway, there are a number of successful bidders, ranked in order of priority. Depending on their ranking, those at the top of "the leaderboard" will be given a different edition number and may obtain more benefits than lower, successful bids, as was the case in the Auction. In a silent auction, participants place sealed bids, unaware of the amounts placed by their competitors, whereas in a ranked auction, such as the Auction, everyone can see what everyone else is bidding, and therefore can make an informed decision as to what is needed to make a successful bid;

(3) The Claimant is a high net worth individual, who is a well-known collector of digital art, who has participated in a number of digital NFT sales platforms. He operates by means of a username called "Mondoir". He is a well-known collector of such substance in the NFT world, he is known as "a whale", on the basis that there are not many collectors spending at his level. As can be seen from his record of transactions with the Defendant, prior to the Auction, the Claimant had purchased some 102 NFTs through the Nifty Gateway, with a combined value of US$2,602,183. He made those purchases through a range of different types of "drops". A number of those purchases were not of unique NFTs, but were of numbered editions, pursuant to a silent auction, where there were multiple successful bidders, including him.

(4) The Claimant signed up for an account on Nifty Gateway on 26 February 2021. It is common ground that, by signing up, the Claimant agreed to and became bound by the Defendant's Terms of Use then in force, which were dated 4 February 2020 (**"the February 2020 Terms"**). Relevant for present purposes are the following:

(i) Clause 1, entitled "Accepting these Terms", stated:

"These Terms of Use set out your rights and responsibilities when you use Nifty Gateway to buy, sell, or display non-fungible tokens ("Nifties" or "Nifty") or create a collection of Nifties (collectively, the "Services"), so please read them carefully. Nifty Gateway is an administrative platform that facilitates transactions between a buyer and a seller but is not a party to any agreement between the buyer and seller of Nifties or between any users..."

(ii) Clause 10, entitled "Modifications", stated:

"You agree and understand that we may modify part or all of Nifty Gateway or the Services without notice."

(iii) Clause 17 contained an arbitration agreement that covered

"... any dispute or claim relating in any way to: your access, use, or attempted access or use of the Site; any products sold or distributed through the Site; or any aspect of your relationship with Nifty Gateway..."

(iv) Clause 19 contained a clause entitled *"entire agreement"*, which stated:

"These Terms of Use comprise the entire agreement between you and Nifty Gateway relating to your access to and use of the Site and Content and supersede any and all prior discussions agreements and understandings of any kind (including without limitation prior versions of this User Agreement)."

(5) On around 12 March 2021, the Claimant was added by the Defendant to the "Whitelist". The Whitelist (otherwise known as the "Allow List") offered users the ability to place bids on Nifty drops up to a prescribed amount without having to provide security for payment of the bid in the event that it was successful, such security usually being the holding of requisite funds in the user's account on Nifty Gateway or via a hold on a credit card. Upon being added to the Whitelist, it would become visible as a "payment method" on the front end of the Nifty Gateway platform when the user was bidding;

(6) On 30 April 2021, the Defendant revised its Terms of Use, pursuant to the provision of clause 10 of the February 2020 Terms (the **"April 2021 Terms"**). The April 2021 Terms are substantially identical to the February 2021 Terms, save for the addition of a new clause 7, entitled "Terms of Sale", which provides:

> *"By placing an order on Nifty Gateway, you agree that you are submitting a binding offer to purchase the non-fungible token "Nifty" or service from Nifty Gateway LLC. Your order is accepted and confirmed once purchase is complete, and Nifty Gateway displays the Confirmation Page ("Confirmation Page"). YOU HEREBY EXPRESSLY AGREE THAT THE SUPPLY OF NIFTY BEGINS IMMEDIATELY AFTER THE CONFIRMATION PAGE IS DISPLAYED."*

There was a dispute on the pleadings as to whether the April 2021 Terms bind the Claimant. However, reliance on the April 2021 Terms does not form part of the Claimant's primary case.

The Beeple Drop and the Creator Agreement with Beeple

19. The Auction was part of a broader sale of Beeple NFTs via various types of drop over several days in late April/early May 2021, known as the "Beeple Drop" or the "Beeple 2021 Collection".

20. The Defendant designed the Beeple Drop in collaboration with Beeple. On 30 April 2021, the Defendant and Beeple entered into a "Nifty Creator Agreement" (the **"Creator Agreement"**), which governed their relationship regarding the Beeple Drop, including the Auction. The Creator Agreement provided:

(1) In the Recitals that "*Nifty Gateway operates the Platform (defined below) and desires to offer Nifty Creator's Nifties (defined below) on the Platform*."

(2) At clause 2, for fees and proceeds. In particular, the Defendant agreed to pay Beeple 95% of the proceeds of sales of Beeple NFTs on the primary market, retaining a commission of 5%.

(3) At clause 3, that the Defendant would effect drops of Beeple NFTs according to Schedule B between 30 April 2021 and 2 May 2021. Further, at clause 3(a)(iii):

> *"Before the Drop Period commences, Nifty Creator will transfer Nifty Creator's Nifties to Nifty Gateway for sale by Nifty Gateway on the Platform. Nifty Gateway will escrow each of Nifty Creator's Nifties in a secure digital wallet as the property of Nifty Creator and exercise the reasonable care of a professional custodian for hire with respect to such Nifties until such time as Nifty Gateway has received full payment for each respective Nifty Creator's Nifty from the Purchaser of such Nifty..."*

(4) At clause 4 for "Sale Terms" between Beeple and purchasers of any Beeple NFTs. Clause 4 obliged the Defendant to present users with the Beeple Terms set out in Exhibit C and to display wording to ensure that the terms were binding as between Beeple and the user. Clause 4 also obliged the Defendant to present to users the terms or requirements of each drop identified in Schedule B.

(5) At Exhibit B the full schedule for the Beeple Drop, which included the Auction, which was described as *"1/100 Leaderboard Style Auction"*. Clause 4 of Exhibit B set out the format of the "*1/100 Leaderboard Style Auction*".

(6) At Exhibit C the Beeple NFT Terms that the Defendant was obliged to ensure bound users participating in the Beeple Drop.

21. It is clear from Mr Nadler's evidence that, at the time of the Auction, Beeple was and is prominent in the NFT world. At paragraph 29 of Nadler 1, he said

> "*He was really a big deal in digital art and had a lot of followers on social media. He was quite clearly the pre-eminent NFT artist at that time. If you collected art NFTs, you know Beeple. At that time, there was a real energy to the space, and Beeple was at the forefront of that.*"

At paragraph 30(2), he said:

"*In 2021, Beeple sold the most expensive art NFT ever for $69 million.*"

At paragraph 31, he stated:

"*In light of Beeple's profile, the Beeple drop was not only a big deal for Nifty Gateway but also a big deal in the NFT art world generally …*"

The Auction and the Auction rules (the "Auction Rules")

22. The Auction commenced on 30 April 2021 and was due to end on 2 May 2021, but for reasons which I will explain ended a few minutes later early on 3 My 2021.

23. The Auction had a landing page, the appearance of which is shown by the documents contained at **[C/28/122]**, which is a screenshot disclosed by the Claimant in the NY Arbitration, shortly after the Auction had closed, and at **[C/51/264]** a recreation of the landing page as it would have looked during the Auction produced by the Defendant (with artificial figures) for the purpose of this litigation. I attach these as pp1 and 2 of the Appendix to this Judgment.

24. On these documents, next to the title "*ABUNDANCE*" was a highlighted icon with a question mark, stating "RANKED AUCTION". If a user clicked on that icon, a box

containing the Auction Rules would be displayed as shown in the documents at **[C/17/104]** and **[C/52/265]**. I attach these documents as pp 3 and 4 of Appendix 1 to this judgment. The rules stated:

> *"**How does this work?***
>
> *Users can place bids during the allotted time period. In the last 5 minutes, bids placed that alter the order of the top 10 positions reset the timer back to 5 minutes.*
>
> *Once the period of time has concluded, the 100 highest bidders will all receive one of the editions, and will pay the price that they bid on the piece. Edition numbers will be distributed in order of highest bids.*
>
> *Bidding will use the same mechanism as we do for auctions. Once the silent auction has concluded, we will send you an email if you won one of the pieces.*
>
> *Position #1 receives edition #1 of ABUNDANCE, GIGACHAD, REBIRTH, BIOLOGICAL COLLECTIBLE, and JANUARY 1ST, 2021. They also receive the #1/1 WHOLE COLLECTION piece.*
>
> *Positions 2-10 receive editions #2-10 (in order of bids) of ABUNDANCE, GIGACHAD, REBIRTH, BIOLOGICAL COLLECTIBLE, and JANUARY 1ST, 2021."*

25. The Defendant accepts that the reference to "the silent auction" in the third paragraph is a typographical error, resulting from the wording being copied over from the rules for a different, but similar, type of drop before being edited.

26. Below the "Place Bid" button on the landing paged, text required by clause 4 of the Creator Agreement was displayed, stating

> "*By bidding on, purchasing or otherwise obtaining a blockchain-based non-fungible token created by Beeple Art LLC ("Beeple") ("NFT"), you are agreeing to the Beeple NFT Terms available here".*

The word "*here*" hyperlinked to the Beeple Terms in Exhibit C to the Creator Agreement.

27. Below the "Place Bid" button was a leaderboard showing the top 100 bids. Each of the top 10 rankings displayed the NFTs, with edition number, that the user in that rank would receive. Below the tenth ranking was displayed the words "*Winners 11-100 will receive The Abundance NFT + Physical".*

28. If a user clicked the "Place Bid" button, they were taken to a bid screen, the appearance of which is shown by the documents at **[C/26/120]** (a screenshot disclosed by the Claimant in the NY Arbitration, from a time after the Auction had closed) and **[C/53/266]** (a recreation of the bid screen as it would have looked during the Auction produced by Defendant, with artificial figures). I attach these as pp5 and 6 of the Appendix to this Judgment.

29. As to that screen shown in those documents:

(1) There was a blue-highlighted box towards the top of the screen, with an "i" icon, stating "This is a ranked auction. **The ranking you have determines the edition number you receive.** As new bids update, your ranking may change. All bids are final. You may place as many new bids as needed." [emphasis added];

(2) The screen displayed a leaderboard showing the current bid rankings;

(3) The "Enter Bid Amount" field, when a figure was entered, displayed the "Projected Rank" of the bid if placed;

(4) Above the "place bid" button further text confirmed the projected rank of the bid if placed.

30. The Auction was advertised while it was taking place. On 2 May 2021, the Defendant sent an email to all users on its mailing list, including the Claimant, announcing that the Auction was "happening today". The Auction was described as *"LEADERBOARD Edition of 100"*, in distinction to other drops within the Beeple Drop that day. On the same day, the Defendant also tweeted the Auction Rules.

31. The Claimant placed 8 bids in the Auction, the first of which was for US$230,000 on 1 May 2021 and the last of which for US$650,000 on 2 May 2021. Each of the bids were placed using the "Whitelist" payment option. One of the bids for US$326,001 which he made on 2 May 2021at 23:58 was not the highest bid in the Auction at the time it was made, which is indicative that he realised that he was not bidding in a traditional auction of a unique NFT. His final bid of USS650,000 was made approximately 13 minutes before the end of the Auction, which had been extended for several minutes into early 3 May 2023 because the Auction Rules provided that when the top position changes within the last five minutes of the Auction, it is extended for another five minutes.

32. The Auction attracted significant attention in the NFT community. There was considerable discussion of the format of the auction online and the bidding itself became a "frenzy", with large volumes of bids being place.

Events following the Auction

33. Within minutes of the close of the Auction, in the early hours of 3 May 2021, the Claimant tweeted an image of the leaderboard on the landing page , referring to the top three bidders (including himself) and congratulating Beeple on *"successful auction"* and commenting *"And I do t [sic] know if I should bad for the 11th place"* (that being the first position that won only a single NFT, rather than the additional editions won by the top 10) **[C/30/126]**. I attach this document at p7 of the Appendix. This document, taken in conjunction with the document at **[C/28/122]**, p1 of the Appendix, provides the clearest evidence that the Claimant was aware to this was not a "first past the post" auction, but a ranked auction and that there were numerous successful bidders, including himself.

34. Also on 3 May 2021, Tommy Kimmelman of the Defendant sought to collect payment of the Defendant's bid. He initially suggested he would do so, but thereafter failed to respond to repeated chasers from the Defendant by direct message and then by email between 3 May 2021 and 10 May 2021.

35. On 7 May 2021, pursuant to the Creator Agreement, the Defendant paid Beeple the total sum of the winning bids in the Auction, less the 5% commission to which it was entitled. That sum included the US$650,000 bid by the Claimant.

36. Although he had earlier expressed dissatisfaction privately with the outcome of the Auction in discussion with the other users, the first time the Claimant raised the issue that he was being asked to pay "*regardless of being the highest bidder or not*", was in a tweet sent at 6.35pm on 22 July 2021, shortly before the Defendant commenced the NY Arbitration. This appears to be the first time that the Claimant has asserted that he did not understand the rules of the Auction.

37. On 22 December 2021, the Defendant transferred the NFT edition #3/100 of "*ABUNDANCE"* to a segregated holding account called "Holding1". It had previously held in the Claimant's account on Nifty Gateway (which had been suspended following his refusal to pay). The Defendant holds that NFT to the Claimant's order and has indicated that it will release it to him upon payment of his liability to the Defendant.

The Law in relation to Auctions

38. **Governing Law** – Although the Defendant's Terms of Use contain a governing law clause stipulating New York law, it is agreed between the parties that the dispute could and should be tried by reference to English law, in particular because there was no material difference between the two systems of law. Neither party has pleaded or sought to prove the content of foreign law, and the "default rule", as explained by Lord Leggatt JSC in ***Brownlie v FS Cairo (Nile Plaza) LLC*** [2021] UKSC 45 at [108]-[118], applies.

39. Under English common law in relation to auctions, there are three contracts formed. This was clearly set out by Lord Denning MR in ***Chelmsford Auctions v Poole*** [1973] 1 QB 542 at 548C-549B, where he stated:

> *"On a sale by auction, there are three contracts:*
>
> *The first is the contract between the owner of the goods (the vendor) and the highest bidder to whom the goods are knocked down (the purchaser). That is a simple contract of sale to which the auctioneer is no party. That was made clear by Salter J. in Benton v. Campbell, Parker & Co. Ltd. [1925] 2 K.B. 410, 416:*
>
> *"To that contract [of sale] the auctioneer who sells a specific chattel as an agent is, in my opinion, no party."*
>
> *The second is the contract between the owner of the goods (the vendor) and the auctioneer. The vendor entrusts the auctioneer with the possession of the goods for sale by auction. The understanding is that the auctioneer should not part with the possession of them to the purchaser except against payment of the price: or, if the auctioneer should part with them without receiving payment, he is responsible to the vendor for the price. As Lord Loughborough CJ. said in Williams v. Millington (1788) 1 Hy.Bl. 81, 85: F*
>
> *"In the common course of auctions, there is no delivery without actual payment, if it be otherwise, the auctioneer gives credit to the vendee, entirely at his own risk."*

> *The auctioneer is given as against the vendor, a lien on the proceeds for his commission and charges.*
>
> *The third is the contract between the auctioneer and the highest bidder (the purchaser). The auctioneer has possession of the goods and he has a lien on them for the whole price. He is not bound to deliver the goods to the purchaser except on receiving the price in cash; or, if he is willing to accept a cheque, on receiving a cheque payable to himself, the auctioneer, for the price. If he does allow the purchaser to take delivery without paying the price—or if the purchaser gets delivery clandestinely or JJ by a trick—the auctioneer can sue in his own name for the full price.*
>
> *That was established in 1788 in Williams v. Millington, 1 Hy.Bl. 81. If the purchaser who has bid the highest afterwards changes his mind and refuses to take delivery, the auctioneer can sue him for the whole A price. The reason is because "The auctioneer sues for the price by virtue of his special property and his lien, and also, in most cases, by virtue of his contract with the buyer, that the price shall be paid into his hands, . . .": see Benton v. Campbell, Parker & Co. Ud. [1925] 2 K.B. 410, 416.*
>
> *Under this third contract, the purchaser cannot avoid his liability to the auctioneer by paying the vendor direct without telling the auctioneer. If he does so, the auctioneer can make the purchaser pay him the full price again, even though it means that the purchaser pays twice over: see Robinson v. Rutter (1855) 4 E. & B. 954. [see also p550D-F].*

40. The auctioneer, as agent for the owner of the goods, is not a party to the contract of sale between the owner and the successful bidder (the first contract) and cannot sue or be sued upon it. The auctioneer's right to payment arises only under the separate, third contract between auctioneer and bidder: ***Benton*** at 415-416, ***Chelmsford*** at 548D-E.

The Defendant's case

41. The Defendant contends that it stood in the position of auctioneer as between Beeple and the Claimant.

42. The Auction Rules were incorporated into the Claimant's bids and any contract which arose at the end of the Auction, either because the Defendant did what was reasonably sufficient to bring the rules to his notice or, alternatively, because the Claimant in fact read and knew of the rules.

43. As a result:

    (1) Each of the Claimant's bids was an offer to purchase the numbered NFT or NFTs corresponding with the ranking of the bid under the Auction Rules at the end of the Auction. That offer was accepted by the Defendant at the end of the auction.

    (2) At the end of the Auction, the Claimant therefore entered into two contracts:

(a) A contract of sale between Beeple and the Claimant by which he agreed to purchase the NFT edition #3/100 of *"ABUNDANCE"* (and the other NFTs allocated to the third place by the Auction rules) for US$650,000; and

(b) There was a collateral contract (**"the Auction Contract"**) between the Defendant, as auctioneer, and the Claimant, pursuant to which the Defendant was entitled to collect the price as Beeple's agent.

44. The Defendant also pleads an alternative case that the Claimant is liable under clause 7 of the April 2021 Terms (see paragraph 18(6) above); and a second alternative case that the Claimant is liable in restitution or by way of equitable subrogation.

The Claimant's Defence to the Counterclaim

45. Prior to his Claim and Defence to Counterclaim being struck out, his various defences can be categorised as follows:

46. The Defendant has no rights under clause 1 of the Terms of Use, which expressly provides that the Defendant is not a party to any agreement between the buyer and the seller of Nifties or any user. This is reinforced by the entire agreement clause in clause 19. He also contended that there was no right to payment under clause 7 of the April 2021 Terms, either because they were not binding or because they were internally inconsistent.

47. He denied that the Auction Rules were incorporated into any contract, so that the Auction must be treated as a traditional "first past the post" auction, whereupon, since he was not the highest bidder, he is not liable in any event. The principal aspect of his defence was that the Auction Rules were onerous or unusual, and therefore required particularly clear notice to be given, in reliance on the well-known principle in ***Interfoto Picture Library v Stletto Visual Programmes*** [1989] QB 433. The Defendant also contended that incorporation was prevented by the entire agreement clause in the February 2020 Terms of Use.

48. In addition to the above contractual defences, he also maintained the following defences (all of which have been struck out):

(1) That the contract was void for mutual mistake because the parties were at cross-purposes as to their terms, the Defendant believing that the terms of the Auction were on the Auction Rules, but the Defendant understanding the Auction to be a traditional auction;

(2) That any contract was void for illegality because: (a) the Auction was *"gaming"* or a *"complex lottery"* under the Gambling Act 2005 and the Defendant did not have a licence; or (b) the Defendant was subject to the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 and failed to comply with those Regulations;

(3) Because of the grant of credit to the Claimant under the terms of the Whitelist, which was regulated by statute, any right to payment was unenforceable pursuant to various statutes governing credit, in particular the Financial Services

and Markets Act 2000, the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, and the Consumer Credit Act 1974.

49. It seems to me that it is necessary for me to consider the defences raised at paragraphs 46 and 47 above, because they relate to the burden that the Defendant has to discharge. It has to be shown that there was a winning bid, which it is entitled to enforce pursuant to the collateral contract which is the third contract referred to in Lord Denning's analysis in the ***Chelmsford*** case.

50. Indeed, Mr Feld accepted that he had to establish what he described as two propositions:

(1) The Auction Rules were incorporated into any contract resulting from the Auction;

(2) The Defendant has a contractual entitlement to payment of the Claimant's winning bid.

51. In relation to the defences, now struck out, at paragraph 48, it is not necessary for me to consider those for the reasons set out in paragraphs 10 and 11 above.

Incorporation of the Auction Rules

Principles

52. These were helpfully, and in my view accurately, summarised in Mr Feld's written submissions.

53. Terms may be incorporated into a contract even though they have not been signed by the counterparty or even read. The principles are well-established and are set out in **Chitty on Contracts** (35th Ed., 2023) at 16-007-16-012. In particular, at 16-010. In a similar vein, a party may be bound by a printed notice that is displayed to them if their attention is drawn to it. In many situations "*it will be sufficient to display a prominent public notice which can be plainly seen at the time of making the contract".* **Chitty** at 16-014.

54. The question in each case is therefore whether the party tendering the terms did what was reasonably sufficient to give the other party notice of those terms. That is a question of fact to be determined in all the circumstances: **Chitty** at 16-011.

55. In the context of a physical auction, it has been held, applying these principles, that terms printed in an auction catalogue were incorporated into the agreement between the bidder and auctioneer, even without any signature on the part of the bidder: ***Morin v Bonhams and Brooks*** [2003] All ER (Comm) 36 [2003] EWHC 467 (Comm) at [7]-[9], [13] and [22] per Jonathan Hirst QC.

56. Those principles set out above are modified by the "***Interfoto*** principle", after the case of ***Interfoto Picture Library v Stiletto Visual Programmes Ltd*** [1989] QB 433. As to that:

(1) The principle is stated in **Chitty** at 16-012:

> *"Although the party receiving the document knows it contains conditions, if the particular condition relied on is one which is a particularly onerous or unusual term, or is one which involves the abrogation of a right given by statute, the party tendering the document must show it has been brought fairly and reasonably to the other's attention."*

(2) *"Onerous or unusual"* imports a high threshold. The authorities refer to terms such as "*unreasonable and extortionate*" or "*the clause must have the potential to act very severely to the detriment of the party in question, almost to the point of being a punishment*": ***Higgins & Co v Evans*** [2019] EWHC 2809 (QB); [2020] 1 WLR 141 at [73] per Saini J. See also ***Bates v Post Office Limited* (*No. 3: Common Issues*)** [2019] EWHC 606 (QB) per Fraser J at [973] and [979].

(3) The principle operates on a sliding scale: the more severe the clause, the more notice is required: ***Higgins*** (above) at [71], ***Bates*** (above) at [979].

(4) As to what must be done to bring a clause *"fairly and reasonably to the other's attention"*, see **Chitty** at 16-012:

> *"The requirement that the term has been brought "fairly and reasonably to the other's attention" is unlikely to be met in the case where the clause is "buried away in the middle of a raft of small print". The practical equivalent of a "red hand" may take the form of a "clear reference" to the term, such as using bold print to highlight the term, the use of capital letters or otherwise giving the clause a degree of prominence in the contract. A further alternative is expressly to draw the existence of the term to the attention of the other party."*

The Defendant's submissions on incorporation of the Auction Rules on the facts

57. The Defendant's primary case is that the Auction rules were incorporated by notice, even if the Claimant was unaware of the notices on the Auction landing page and bid screen and did not read the rules.

58. Applying the principles above, the Defendant did more than was reasonably sufficient to notify the Claimant about the nature of the Auction:

(1) The landing page to be found at pp1 and 2 of the Appendix **[C/28/122] [C/51/264]** (pp1 and 2 of the Appendix) clearly displayed a highlighted icon stating, *"RANKED AUCTION"*, with a question mark. A reasonable user would understand: (1) that the Auction had particular rules; and (2) from the use of the question mark, that further information could be obtained by clicking the icon. If the icon was clicked, the Auction rules were clearly displayed **[C/17/104]** – see p3 of the Appendix.

(2) In any event, the nature of the Auction and its rules were abundantly clear from the live leaderboard on the landing page, which stated in terms that numbered NFTs were to be won by bids ranked below the first.

(3) In any event, the bid screen contained a prominent and highlighted notice stating in terms the key rule that *"The ranking you have determines the edition number you receive"* – see pp5-6 of the Appendix **[C/26/120]**, **[C/53/266]**.

(4) Other features of the bid screen also made clear that the Auction was not a traditional auction and that bids ranked below first would entitle and require the purchase of numbered NFTs, in particular the leaderboard and the "projected rank" functionality.

(5) Each of the matters above, individually and cumulatively, was a "prominent public notice" of the rules of the Auction, or at least of the fact that the Auction was not a traditional auction and instead one where a bid lower than first place would result in a sale.

(6) In addition to the foregoing, the nature of the Auction was made clear by a direct email to the Claimant (although this was not until Sunday 2 May 2021 at 3.03pm on the last day of the Auction), and statements on X (formerly Twitter), which were published during the Auction and before the Claimant placed his final, successful bid.

(7) The evaluation of the sufficiency of the steps taken to bring the rules to the Claimant's notice must take into account the fact that he was a very experienced user of the Defendant's platform, and was well-versed in participating in a range of drop formats, including those that resulted in multiple winners of numbered edition NFTs: see paragraph 18(3) above. In that regard, see ***Morin v Bonhams*** (referred to at paragraph 55 above) at [22].

59. In relation to the Defendant's reliance on the ***Interfoto*** principle:

(1) The Claimant's case rested on the false premise that "Ranked Auction" had an established meaning of "traditional auction", such that the Defendant's use of that phrase to describe an auction in which bids lower than first place were successful was "onerous or unusual". Mr Feld relied on the fact that Mr Gall's report says that "ranked auction" was not a term of art. The ***Interfoto*** case must fail for that reason alone.

(2) In any event, there is nothing remotely onerous or unusual about the auction format, let alone something that could satisfy the high threshold referred to above. That the Auction might have been designed to maximise the return to Beeple is nothing to the point.

(3) In any event, the Defendant did enough to satisfy the ***Interfoto*** principle by bringing the nature of the Auction *"fairly and reasonably to the other's attention"*, for the reasons given in paragraph 58 above.

60. The Claimant also said that the entire agreement clause in the February 2020 Terms (and the April 2021 Terms) precluded incorporation of the Auction Rules. There is nothing to that point: the Defendant does not say those rules were incorporated into the Terms of Use, but rather formed the basis for the contract of sale between the Claimant and Beeple and the Auction Contract between the Claimant and the Defendant.

The Claimant's knowledge of the Auction Rules

61. In the alternative, the Defendant contends that the Claimant must in fact have known of and understood the nature of the Auction and its rules, at least by the time he placed his successful bid, and so is bound by them for that reason.

62. In addition to the points relied upon at paragraph 58 above, Mr Feld relied upon the following matters:

    (1) The Claimant's tweets immediately after the Auction, indicating familiarity with the way the Auction worked and no dissatisfaction with the process[1];

    (2) It beggars belief that someone as experienced as the Claimant with the range of drop formats on Nifty Gateway genuinely believed that the Auction was of a single, unique NFT, particularly given the format of the various Auction pages and the way the Auction was marketed;

    (3) Whether or not the Claimant was interested in the Auction rules per se, he must have been interested in the lot on which he was bidding. In that regard, it was clear that the top 10 bidders would win additional NFTs associated with digital art other than *"ABUNDANCE"*, whereas bids 11 and above would not. It is highly unlikely that this would have escaped his notice;

    (4) The Defendant did not make any suggestion at the time that he had not understood the nature of the Auction. He did not do so publicly; he did not do so in correspondence with Mr Kimmelman during the Auction; he did not do so when being chased for payment by the Defendant; and he did not even do so privately when complaining about the Auction with other users;

    (5) As stated at paragraph 31 above, one of the Claimant's bids was not calculated to place him in first position (although, in fairness to the Claimant, the first place bid at the time was made around nine seconds before his bid).

Discussion and conclusion on the incorporation of the Auction Rules into the Auction Contract

63. Having carefully considered the documentary evidence in this matter, I have come to the clear conclusion that the Auction Rules were incorporated into the Auction Contract on both the primary and secondary cases advanced by the Defendant.

64. In relation to the primary case, applying the principles referred to at paragraphs 53-55 above and the facts relied upon by Mr Feld at paragraph 58, I am satisfied that the Auction Rules were brought fairly and reasonably to the Claimant's attention, particularly his previous participation in drops where there were multiple successful bidders. I do not regard the ***Interfoto*** principle as being engaged. I do not regard the terms of the Auction Rules as being "onerous or unusual", but if I am wrong on that, I regard the steps taken by the Defendant described as sufficient to draw those terms to the Claimant's attention.

[1] See **[C/30/126]**, where on 3 May 2021, after producing the first three ranked winners, including himself, he subsequently stated "*And I do t [sic] know if I should feel bad for the 11th place.*".

65. As far as the Claimant's actual knowledge is concerned, given the documents produced by the Claimant at [**C/28/122]**, p1 of Appendix 1, and his tweets at [**C/30/126**], p7 of Appendix 1, I am in no doubt that he was well aware that this was a ranked auction and not one that was "first past the post". The triumphalism in the language used, shows he clearly knew about the Auction Rules. I also accept the force of the other points made by Mr Feld in paragraph 62 above. I find that the fact that he did not raise the "traditional auction" defence until 22 July 2021, shortly before the NY Arbitration, was a device used by him to avoid payment, probably because he felt he had overpaid, and was an exercise in "buyer's remorse". I would add that these findings completely undermine the other defence of "mutual mistake" advanced by the Claimant, referred to at paragraph 48(1) above,

Does the Defendant have a contractual entitlement to payment of the Claimant's winning bid?

66. Simply stated, the Defendant contends that the Claimant is liable to pay the price of his successful bid to the Defendant, the auctioneer and Beeple's agent for the purposes of the contract of sale, pursuant to the collateral Auction Contract.

67. That case follows and applies the orthodox common law analysis of a successful bidder's liability to an auctioneer. Further, the facts and written terms in this case are consistent with, and supportive of, that common law analysis:

(1) As a matter of substance, the Defendant was an auctioneer, and the Auction was, and was clearly described as, an auction. There is no reason for the common law analysis of offer and acceptance in such circumstances, or the characterisation of the tripartite contractual relationship between seller, auctioneer and purchaser, to be modified or affected by the facts that: (1) the auction was virtual; or (2) the rules were such that there were multiple winners.

(2) The Creator Agreement is consistent with and supportive of the common law position. It has the features of the "second contract" referred to in paragraph 39 above. In particular, it makes clear that: (1) the NFTs remain the property of Beeple until sold and are entrusted to the Defendant for the purposes of sale; (2) that the Defendant has the classic obligations of an auctioneer, i.e. to sell on behalf of Beeple, to collect the price for Beeple, less a commission, and to part with the NFTs only in return for the price.

(3) Contrary to the Claimant's case, clause 1 of the February 2020 Terms (and clause 1 of the April 2021 Terms), is entirely consistent with the common law analysis and with the existence of the Auction Contract. Clause 1 reflects the fact that the auctioneer is not a party to the contract of sale.

(4) It is not necessary to consider clause 7 of the April 2021 Terms (since the Claimant himself asserted that they do not bind). But in any event, that clause is also consistent with the common law analysis. It merely reflects the fact that the Defendant, as agent, makes the contract of sale for Beeple, and that the price is payable directly to the Defendant pursuant to the Auction Contract (see e.g. ***Chelmsford*** (above) at 549H and 550E-F).

The Claimant's submission that the Defendant has no contractual entitlement to recover anything against him

68. The Claimant's defences are:

(1) the Defendant has no contractual relationship with auction participants that would allow it to recover the price of bids;

(2) the entire agreement clause in the February 2020 Terms prevents the collateral Auction Contract from arising;

(3) there can have been no contract of sale with Beeple, and therefore no Auction contract, because NFTs were never "delivered" to purchasers.

Discussion and conclusion on whether the Defendant have a contractual entitlement to payment of the Claimant's winning bid

69. Stated shortly, I prefer the Defendant's contractual analysis which is consistent with the common law principles I have set out above.

70. In relation to each of the points made by the Claimant:

(1) The submission that the Defendant has no contractual relationship with auction participants that would allow it to recover the price of bids is, as Mr Feld submitted, both uncommercial and self-serving. Neither the Defendant nor any other auction participant had any direct dealings whatsoever with Beeple. Auction participants only ever dealt with the Defendant. The Defendant is to be regarded as Beeple's agent; in which case the auction analysis applies;

(2) In relation to the entire agreement clause in the February 2020 Terms:

(a) the clause bites only on *"prior discussions, agreements, and understandings"*. The Auction Contract did not precede the February 2020 (or indeed the April 2021) Terms;

(b) in any event, the entire agreement purports only to limit the scope of the agreement as relates *"to your access to and use of the Site and Content"* (c.f. the arbitration agreement which is far broader in scope). The Auction Contract did not relate to the Claimant's access to and use of the Site or Content; it related to the formation of, and his liability in respect of, the contract of sale with Beeple; and

(c) the Auction Contract did not purport to be part of or incorporated into the Terms of Use, but rather was an entirely separate contract, collateral to the contract of sale with Beeple (not the Terms of Use), which was consistent with and indeed envisaged by the Terms of Use.

(3) In relation to the Defendant's submissions that there can have been no contract of sale with Beeple, and therefore no Auction contract, because NFTs were never "delivered" to purchasers. That was said to follow from the fact that NFTs were only ever held at the address of the Defendant's omnibus wallet before and after sale, with no change to the blockchain. That would lead to the absurd

conclusion that no winner was liable to anyone. But in any event, it was also a bad point because a transfer was effected by allocating NFTs held at the Defendant's address to the account of the purchasing user in the Defendant's internal books, after which the user controlled the NFT and could transfer it to the address of its choosing, as was made clear in the evidence of Mr Nadler and Mr Kimmelman. "Delivery" was therefore effected by the analogy of attornment,[2] as is perfectly common.

71. In the light of my finding above in relation to the Auction Contract, it is not necessary for me to consider the Defendant's alternative cases referred to at paragraph 44 above.

Conclusion

72. In my judgment, the Claimant is liable to the Defendant on its Counterclaim for the sum of US$650,000.

Interest

73. There is the issue of interest. The Defendant has served the third statement of Mr Allen, the partner at Enyo Law LLP, with conduct of the case (**"Allen 3"**), which sets out the position on interest and costs.

74. The Defendant claims interest until judgment on the principal sum of US$650,000 at the US Prime Rate. That is the default interest rate under s.35A Senior Courts Act 1981 for US$ awards in the Commercial Court: ***Lonestar Communications Corp LLC v Kaye*** [2023] EWHC 732 (Comm); [2023] 2 All ER (Comm) 605 at [14]-[15] per Foxton J. In my view it is the correct rate to apply in the present case.

75. According to paragraph 3 of Allen 3, on that basis the accrued interest from 2 May 2021 to 23 January 2024 is US$102,245.27. I order that sum. Thereafter interest should accrue at the judgment default rate in s.17 of the Judgments Act 1838.

Costs

76. The Defendant seeks its costs of the action (to the extent not already covered by various awards of costs made at the interim stage), and invites the Court to assess costs summarily at the end of trial, rather than ordering detailed assessment: (1) in view of the Claimant's disengagement with the proceedings, he is highly unlikely to agree the quantum of costs, which will make a full detailed assessment inevitable; (2) detailed assessment proceedings would be both disproportionate and a further waste of costs, particularly bearing in mind the excessive cost of these proceedings to date relative to the principal sum in dispute (driven by the Claimant's conduct both in relation to jurisdiction and the array of points taken).

77. In that regard:

    (1) It has been held that the "general rule" in PD44 para 9.2(b) does not apply to a trial in a non-fast track case even if it does not exceed a day: ***Certain***

[2] It is unlikely that there could have been an attornment properly so-called because the prevailing view is that crypto-assets such as NFTs cannot be physically possessed.

Underwriters at Lloyd's London v Syrian Arab Republic [2018] EWHC 385 (Comm) at [89] per Henshaw J;

(2) However, the Court has a discretion to summarily assess costs under CPR 44.6(1) and has a duty to consider whether to do so under PD44 para 9.2(b) (***Syrian Arab Republic*** at [90]). The Court should do so for the reasons given above.

78. For the reasons advanced by the Defendant above, I am of the view that unusually I should assess the costs summarily. I note that the Defendant seeks costs on an indemnity basis.

79. I would like to hear further argument on costs upon the handing down of this judgment.

80. I would also be grateful if a draft Order could be prepared.