

SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC
MC 71/2021

In the ex parte matter of:

IN TOUCH SPORTS LIMITED
(rep. by Bernard Georges)

Plaintiff/Petitioner

and

PERSONS UNKNOWN
(unrepresented)

1st Defendant

OKEX MALTA LTD
(unrepresented)

2nd Defendant

OKEX MT LTD
(unrepresented)

3rd Defendant

OKEX INTERNATIONAL HOLDING CO. LTD
(unrepresented)

4th Defendant

AUX CAYES FINTECH CO. LTD
(unrepresented)

5th Defendant

Neutral Citation: *In Touch Sports Ltd v Persons Unknown & Ors* (MC 71/2021) [2021] SCSC (09 December 2021).

Before: Burhan J

Summary: Ex parte Application for Recognition and enforcement of freezing Injunction and Disclosure Order; Application dismissed

Heard: 8th November 2021

Delivered: 09 December 2021

ORDER

BURHAN J

- [1] This is an ex-parte application for recognition and enforcement of Freezing Injunction and Disclosure Order obtained on 5 March 2021 in the Isle of Man Court. The Applicant is seeking to recognise the said Orders as valid and enforceable in Seychelles.
- [2] The Applicant, IN TOUCH SPORTS LIMITED is a company registered in the British Virgin Isles and held cryptocurrency with third parties. The First Respondent is Persons Unknown (being the person/s who sent instructions to Sovereign Trust (Isle of Man) Limited purportedly on behalf of Mr James Adams to transfer Bitcoin to the address [bitcoin address] and/or the person/s who received the benefit of the following Bitcoin transactions hashes: [transaction hash-1] and [transaction hash-2]). The Second Respondent, OKEX MALTA LTD, is a company registered in Malta. The Third Respondent, OKEX MT LTD, is a company registered in Malta also. The Fourth Respondent, OKEX INTERNATIONAL HOLDING COMPANY LTD, is a company registered in the British Virgin Isles. The Fifth Respondent, AUX CAYES FINTECH CO. LTD, is a company registered in Seychelles.

Background

- [3] The Applicant avers that it was subject of a fraud where the third parties who held cryptocurrency on behalf of the Applicant were duped into transferring 17.1 Bitcoin (equivalent to around SCR13,685,714 / USD638,667 at the time). The Isle of Man Orders were obtained in order to stop further flow of funds. The Isle of Man Court granted Freezing Injunction against the First Respondent, Persons Unknown and Disclosure Order against Respondents 2 to 5. The Disclosure Order was sought in order to identify details in respect of a relevant account and any linked account necessary to identify the First Respondent to be able to pursue proceedings against that person in the Isle of Man and provide them the opportunity to defend those proceedings; and to identify the status of the stolen Bitcoin and whether any proportion of it had been blocked and was available for recovery or where it had been paid, which may help identify further wrongdoers complicit in the fraud. The Applicant states that the identity of the First Respondent cannot be known without compliance with the Disclosure Order.

- [4] The Applicant states in the Application that the Fifth Respondent, AUX CAYES FINTECH CO. LTD, company registered in Seychelles has confirmed that (i) it holds two accounts believed to be subject to the Orders and (ii) these accounts have been frozen but that further details cannot be provided until the Orders have been domesticated by the Seychelles Courts. It is further stated that the Compliance Team of the AUX CAYES has confirmed that they will comply with any legal requests made by the FIU/law enforcement agencies/Courts of Seychelles accordingly once they receive the orders. The Applicant therefore states that it is crucial that domestication of the Orders in Seychelles is obtained; it is necessary and fundamental to the Applicant's ability to pursue a civil claim before the Isle of Man Courts against the First Respondent as a result of fraud.
- [5] The Applicant further submits in the Application that the Isle of Man Judgement confirms that the Isle of Man had jurisdiction to hear the application for the Orders and to grant the Orders. It is also submitted that the Isle of Man Court fully and properly considered the relevant law and legal principles and evidence as presented orally before the Court. Therefore the Isle of Man Court applied the correct law ("*la loi competente*") to the matter in accordance with the rules of Seychelles private international law. It is further submitted that the rights of the Respondents were respected and the ex parte Application for the Order was lawful and necessary and appropriate in all the circumstances; and duties of full and frank disclosure were complied with. The Applicant submits that the Orders were not contrary to any fundamental rules of public policy and were obtained in the proper manner and in the absence of any fraud.

Further Submissions

Since there are several avenues available to register and recognise foreign court orders as valid and enforceable in Seychelles and the Application did not expressly state which of the routes the Applicant is pursuing, this Court has sought further clarification from the Applicant by way of Submissions. In particular, this Court has requested Submissions in relation to the following issues:

1. What are the legal provisions under which the application for recognition of Freezing Injunction Order and Disclosure Order is brought;
2. What are the requirements and conditions that need to be satisfied for recognition of Isle of Man Orders;
3. Whether Isle of Man had jurisdiction in general and – with regards to Respondent’s presence or residence or submission to the foreign jurisdiction; Did the Respondents submit to the Jurisdiction of the Isle of Man Court;
4. How were the rights of the Respondents respected, given that this was an ex-parte application and the First Respondent is persons unknown;
5. Submissions regarding recognition and enforcement of foreign ex parte Orders in Seychelles;
6. Given that only the Fifth Respondent, Aux Cayes Fintech Co Ltd, is a Seychelles Company, on which basis can Seychelles court recognize Orders as valid and enforceable against First to Fourth Respondents.

[6] The Submissions were filed by the Applicant, although the clarification in relation to 5th point was omitted.

[7] From the Submissions of the Applicant in relation to points 1 and 2, it is apparent that the Applicant pursuing recognition and enforcement of foreign orders under *Ablyazov* procedure (*Ablyazov v Outen & Ors* (SCA 56/2011 & 08/2013) [2015] SCCA 23 (28 August 2015)). It is submitted by the Applicant that the *Ablyazov* procedure appears to be an extension of the *Privatbanken* procedure (*Privatbanken Aktieselskab v Bantele* [1978] SLR 226)) and allows application to be brought ex parte supported by affidavit. It is submitted that *Ablyazov* procedure is useful for interim or summary orders made by a foreign court. In order for the Application to succeed the conditions set out in *Privatbanken* must be satisfied.

Privatbanken Conditions

[8] The conditions for a foreign judgment to be declared executory under *Privatbanken* are:

“(1) The foreign judgment must be capable of execution in the country where it was delivered;

(2) The foreign Court must have had jurisdiction to deal with the matter submitted to it;

(3) *The foreign Court must have applied the correct law (“la loi competente”) to the case in accordance with the rules of the Seychelles private international law;*

(4) *The rights of the defence must have been respected;*

(5) *The foreign judgment must not be contrary to any fundamental rules of public policy; and*

(6) *There must be absence of fraud.”*

The authority for the above is to be found in Encyclopedic Dalloz, Droit International, Verbo Jugement Etranger (Matières Civile et Commerciale) paragraph 193 to 248; Batiffol & Lagarde, Droit International Prive, 6eme Edition, Tome II, paragraphs 712 to 729.”

[9] Considering that the First Respondent is Persons Unknown and Second to Fifth Respondents are companies incorporated in various jurisdictions and the application in the Isle of Man Court was ex parte, it is apparent that at least three conditions relating to jurisdiction, correct law and respect of the defence rights might be not satisfied.

[10] This Court makes reference to the decision in *DF Project Properties (Pty) Ltd v Fregate Island Pvt Limited* (SCA 56/2018 and SCA 63/2018 Appeal from CC 29/2014) [2021] SCCA 28 (21 July 2021) where the Court referred to extracts from *Privatbanken* in relation to the second condition, that the foreign Court must have had jurisdiction to deal with the matter submitted to it. Sauzier J held in *Privatbanken*:

“... the trial Court must have jurisdiction in the international sense and also local jurisdiction. The first must be determined in the light of Seychelles private international law whereas the second in the light of the law of the country of the trial Court”.

With regard to Seychelles private international law the court held:

“As far as the jurisdiction of the Supreme Court of Seychelles is concerned it is now almost entirely governed by English law or by law based on English law. Since the rules of private international law must necessarily have their foundation in the internal law, therefore those rules dealing with the jurisdiction of foreign courts in the international sense must be based substantially on the provisions of our law regarding the jurisdiction of Seychelles Courts, more particularly the jurisdiction of the Supreme Court of Seychelles. In this respect therefore we should be guided by English rules of private international law...”

[11] It was held that the criterion for the jurisdiction of the foreign court in terms of Seychelles law under the rules of private international law is either “*residence or presence in, or submission or agreement to submit to the foreign jurisdiction*”.

- [12] In the present case as stated by the Applicant in the Submissions, the Respondents did not submit to the jurisdiction of the Isle of Man Court. However, it is submitted that this was lawful and necessary and appropriate in all the circumstances. Due to the nature of the case it was not possible to identify persons unknown who acted in the virtual sphere to steal cryptocurrency, let alone serve them and made to submit to the jurisdiction. It is further submitted that it was not practical to serve other Respondents prior to obtaining the orders for fear of alerting the perpetrators and risking further dissipation of assets. The Applicant states that the Second to Fifth Respondent have been subsequently served with the Orders.
- [13] The Applicant submits that the above also partially answers the issue of whether the rights of the defendants have been respected, given that this was an ex parte application. It is further submitted that the only Order against the Second to Fifth Respondents is a discovery order and this is by way of obtaining information only and that there are no rights which the Discovery Order is likely to contravene. The Applicant submits that this Court is only concerned with the Fifth Respondent, which is registered in Seychelles and if the company objects to providing the information it can apply for the protection of this Court.
- [14] This Court notes that with regards to ex parte application, the Court of Appeal in *Ablyazov v Outen & Ors* (SCA 56/2011 & 08/2013) [2015] SCCA 23 (28 August 2015) justified ex parte application in the Supreme Court and stated that Mr Ablyazov had opportunity to apply for discharge of the orders, which he did not do but subsequently appealed. The ex parte order in question though was ex parte order of Seychelles Court. With regards to UK receivership orders that were sought to be registered and that were subsequently registered in Seychelles, the Court stated the UK orders were granted after “*an adversarial hearing which lasted 4½ days*”. Furthermore, as observed by the Court, Mr Ablyazov was a “*at the material time resident in England, having obtained asylum status in England*”. Therefore, the UK Courts had jurisdiction over him, which is not the situation in the present case. This Court further notes that *Ablyazov* decision emphasised that:

“[44] . . . A national court seems to take into account that a receiving order is not an enforcement exercise but a protection exercise under the principle of good order under the rule of law. Protection of assets no matter which jurisdictions the assets exist in is of a universal concern. Courts have therefore invoked their inherent jurisdictions to do so.”

[15] The Applicant in present case submitted that present Application is in the nature of a protection exercise rather than an enforcement exercise. Given that the Disclosure Order will facilitate the investigation of fraud, help identify the perpetrators and the Freezing Injunction Order will assist in protection of assets.

[16] This Court appreciates that in this particular regard this case may be similar to *Ablyazov*. However, it is also noted that unlike present case, *Ablyazov* did not involve order against Persons Unknown and the UK Court which granted the orders actually had jurisdiction over Mr Ablyazov. Further the Orders sought to be recognised and enforced in the present case give the Respondents the right to apply to set aside or vary the orders. However, even if this Court accepts that due to the nature of the case, the rights of the Respondents could be deemed to have been respected, there is still an issue with regards to the Isle of Man Court’s jurisdiction to deal with the matter as the 2nd to 5th Respondents did not submit to the jurisdiction of the Court and are not resident in Isle of Man. This creates further potential issue with regards to the first condition under *Privatbanken* that the foreign judgment must be capable of execution in the country where it was delivered. At this point it does not appear that the Orders against 2nd to 5th Respondents are capable of execution in Isle of Man as further enforcement orders must be sought in the Respondents’ respective jurisdictions.

[17] This Court also appreciates that technological advances in the financial sector increase the risk of transnational fraud which creates legal challenges in enforcement, prevention and tracing of the assets, especially cryptocurrency. There is therefore the need for jurisdictions to adapt and change their laws in order to meet these challenges.

Comparative analysis of other jurisdictions

[18] This Court also appreciates that the nature of foreign interim orders as in present case, freezing injunction and disclosure orders is different to a ‘standard’ foreign judgments where parties submit to foreign jurisdiction and litigate in the foreign forums. Due to its

nature foreign interim orders might not satisfy conditions laid down by *Privatbanken*. However, this is a current law in Seychelles and this court must follow it.

[19] This illustrated the courts' challenges in interpreting the legislation to address all different types of foreign judgments and interim orders. Due to the difference in their nature, different conditions and approach in their domestication is desirable. This Court observes that other jurisdictions tackle these kind of challenges through legislation. For instance, the British Virgin Isles enacted legislation empowering its courts to grant freezing injunctions in support of foreign proceedings in order to override decision in *Broad Idea International Limited v Convoy Collateral Limited*, BVIHCMAP2019/0026, 29 May 2020. Prior to the decision in *Broad Idea*, in brief, the BVI Court in *Black Swan Investments ISA v Harvest View Limited and Anor*, BVIHCV 2009/399, 23 March 2010 granted, without statutory authority, freezing orders over non-cause of action defendants located in the BVI. The precedent was set for the next 10 years until *Broad Idea* overturned the said decision holding that the BVI courts had no jurisdiction to grant injunctions in aid of foreign litigation without statutory authority to do so. The Court went on to note that the BVI legislature should consider enacting legislation that will confer the Court with necessary jurisdiction. In response, Section 24A of the Eastern Caribbean Supreme Court (Virgin Island) Act was enacted which empowers the court, subject to the conditions set out in the section, to grant interim relief where proceedings have been or are about to be commenced in a foreign jurisdiction.

[20] Similarly, Hong Kong also enacted legislation that empowers courts to grant interim relief in the absence of substantive proceedings (section 21M of the High Court Ordinance). The UK had similar legislation in relation to Lugano and Brussels Convention member states.

[21] This further shows the need to consider such issues as comity of nations and reciprocity, meaning whether Seychelles is prepared to register foreign injunctions and disclosure orders from any countries or only those with whom they have reciprocity and Seychelles injunction would be capable of being registered in that state. These issues need to be addressed and decided upon by the legislature.

Seychelles Jurisdiction over only Fifth Respondent

- [22] Furthermore and most importantly, Seychelles courts only has jurisdiction over one of the Respondents, Fifth Respondent. Hence the Court asked the Applicant to clarify on which basis this Court can recognise the Orders as valid and enforceable against all the Respondents. The Applicant submitted that the Court’s jurisdiction can only extend to Seychelles and the recognition and enforcement in Seychelles can only extend to the Fifth Respondent. Since the Isle of Man action was started against multiple Respondents, the Orders were made simultaneously against all of them. The Applicant states that all this Court is asked to do is to recognise and render enforceable the Orders in this jurisdiction and this will de facto mean recognition and enforcement by way of discovery against the Fifth Respondent alone.
- [23] This Court, however, is not prepared to register foreign orders as valid and enforceable in Seychelles against foreign Respondents, over whom this Court does not have jurisdiction. It is in the Court’s opinion that Orders are not severable, meaning if one is registered so should the other one be also. Furthermore, Disclosure Order as it stands cannot be registered only against Fifth Respondent. In this Court’s opinion once again there must be specific legislation that permits such recognition and enforcement. For instance, in Singapore the Choice of Court Agreements Act was brought into effect to give domestic effect to the Choice of Court Agreements at the Hague Convention. The Act therefore is only applicable to foreign judgments from the courts of the Hague Convention contracting states. Nevertheless, section 19(b) of Part 3, Recognition and Enforcement of Foreign Judgments and Enforcement of Judicial Settlements states that severable part of foreign judgment shall be recognise if “*only that part is capable of being recognised, or recognised and enforced, as the case may be, under this Act*”. Therefore, if Seychelles courts had similar statutory power, the Court could have potentially registered as valid and enforceable only part of the Disclosure Order against the Fifth Respondent. Seychelles however does not have similar provisions.
- [24] This Court also notes that *Ablyazov* decision was against foreign national, Mr Ablyazov. The Court of Appeal found a basis for its jurisdiction in section 11 of the Courts Act:

"11. The jurisdiction of the Supreme Court in all its functions shall extend throughout Seychelles:

Provided that this section shall not be construed as diminishing any jurisdiction of the Supreme Court relating to persons being, or to matters arising, outside Seychelles."

- [25] The Court further found that it had inherent jurisdiction. Mr Ablyazov's connection to Seychelles however was through his assets. In Saint Christopher and Nevis decision cited by the Court in *Ablyazov* in relation to sufficient connection – *Millenium Financial Limited and Thomas MC Namara and Anor*, HCAP 2008/012, the Court of Appeal of Saint Christopher and Nevis actually set aside the order recognizing and giving effect to the US order appointing the receiver. The Court found that there was not sufficient connection between Millennium Nevis and the US as Millennium Nevis was incorporated in Nevis, was not a party to the US action; and there was no evidence that it conducted business in the US or that it submitted to the US jurisdiction (apart for the actions of the US Receiver acting on behalf of Millennium Uruguay). It was held that this finding alone was sufficient to dispose of the appeal in the appellant's favour.
- [26] Therefore, unlike this case, the party against whom the recognition was sought in *Ablyazov* was known and furthermore the UK Courts had jurisdiction over him to make the initial receiver orders and found sufficient connection with Seychelles on the basis of his assets.
- [27] It is noted that as per the Applicant the Fifth Respondent has confirmed that it holds two accounts believed to be subject to the Orders and such accounts have been frozen. On this basis the substantial connection could potentially be established only in regard to the Fifth Respondent, although this is not expressly averred by the Applicant. With regards to the Second to Fourth Respondents, their connection to Seychelles has not been established.
- [28] For the abovementioned reasons and without proper statutory authority this Court is not prepared to register interim orders against Persons Unknown and against Second to Fourth Respondents who have no connection to Seychelles, apart from being connected to the same cause of action abroad. This Court further is not of the opinion that the

Orders can be severed to apply only against the Fifth Respondent. Furthermore, this Court is of the opinion that the Orders do not fully satisfy *Privatbanken* conditions.

[29] It should also be noted that at present Seychelles has established procedure in relation to freezing of assets for example, through the Financial Intelligence Unit. With regards to the courts' powers to register interim orders of such nature as in the present case, it is the opinion of this Court that at present it still needs to follow *Privatbanken* conditions, which cannot always be satisfied in cases like present. Therefore, unless the legislature enacts specific legislation to address challenges in cases as present, this Court is not empowered to register the Orders. For the reasons stated above the application is dismissed.

Signed, dated and delivered at Ile du Port on 09 December 2021

M Burhan J