



Neutral Citation Number: [2023] EWHC 2974 (KB)

Case No: QB-2022-001266

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 30 October 2023

**Before:**

**MR. NEIL MOODY, KC**  
**(Sitting as a Deputy High Court Judge)**

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**Between:**

**LAVINIA DEBORAH OSBOURNE**

**Claimant**

**- and -**

**(1) PERSONS UNKNOWN CATEGORY A**  
**(being the natural and/or legal persons who on 17 January**  
**2022 unlawfully gained access to and removed from the**  
**Claimant's cryptoasset wallet ending 7456 Non-Fungible**  
**Tokens titled**

**'Boss Beauties #680' and/or 'Boss Beauties #691')**

**(2) PERSONS UNKNOWN CATEGORY B**  
**(being the natural and/or legal persons who are in possession**  
**and/or control of the Non-Fungible Tokens titled**  
**'Boss Beauties #680' and/or 'Boss Beauties #691')**

**(3) THEMBANI DUBE**

**Defendants**

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**RACHAEL MULDOON (C)** (instructed by **Duane Morris LLP**) for the Claimant  
No attendance or representation on behalf of the **Defendants**

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**Approved Judgment**

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## NEIL MOODY KC:

1. This is an unusual case which raises novel issues. It arises from the alleged unlawful removal on 17<sup>th</sup> January 2022 by persons unknown of two non-fungible tokens named “Boss Beauties #680” and “Boss Beauties #691” from a cryptoasset wallet owned by the Claimant and held on a cryptoasset management platform. It gives rise to a number of interesting questions, including whether a non-fungible token is capable of amounting to property and the *lex situs* of a non-fungible token. It is not necessary for me to address these issues today, not least because the case has already been the subject of three judgments of this Court. It is not proportionate for me to traverse again the ground that has already been well-travelled by other judges.
2. The background to this case is set out in the judgments of HH Judge Pelling KC [2022] EWHC 1021, Lavender J [2023] EWHC 39 and Mr. Healy-Pratt sitting as a Deputy Judge of the High Court [2023] EWHC 340. The judgment of Mr. Healy-Pratt at paragraphs 3 to 17 sets out the history as at February 2023:
  - “3. The Claimant describes herself as a Blockchain, Fintech and Welltech specialist consultant and thought leader, whose work entails speaking, training and consulting internationally. In November 2020 the Claimant opened an account with the cryptoasset management platform, MetaMask. Her account included four wallets, one of which I will refer to as the MetaMask Wallet. This wallet was linked to the Claimant's account with Ozone Networks Inc, an online cryptoasset marketplace trading as Opensea (‘Opensea’).
  4. This case concerns non-fungible tokens (‘NFTs’). The Claimant was given two NFTs, entitled ‘Boss Beauties #680’ (‘BB#680’) and ‘Boss Beauties #691’ (‘BB#691’), which I will call ‘the Two NFTs’. They were part of a set of 10,000 NFTs representing unique digital works of art depicting inspirational women, each of which also entitles its holder to attend exclusive virtual events and confers other benefits on its holder. The Two NFTs are said to be worth between £3,000 and £5,000.
  5. The Two NFTs were deposited in the MetaMask Wallet on 25 September 2021, but on 17 January 2022 the Two NFTs were transferred out of the MetaMask Wallet without the Claimant's knowledge or consent by an unidentified person or persons, whom I will call ‘the Alleged Hackers’, and who had deposited approximately £150 worth of the cryptocurrency Ethereum in the MetaMask Wallet. It is suggested that a failure in the system architecture may have enabled this unauthorised transaction.
  6. The Claimant discovered this on 17 February 2022 and retained an investigator, Robert Moore, of M to M (Mitmark) Limited, to trace the Two NFTs. As set out in a report dated 4 March 2022, his findings were as follows:
    - (1) The Two NFTs were initially transferred to a wallet which has been referred to as ‘the Wallet ending Cd32’.
    - (2) Each of the Two NFTs was then transferred two or three more times to wallets which were linked to separate accounts with Opensea.
    - (3) By 4 March 2022:

- (a) BB#680 was in a wallet which has been referred to as ‘the E29269 User Wallet’; and
  - (b) BB#691 was in a wallet which has been referred to as ‘the jawwn.eth User Wallet’.
7. On 10 March 2022 HHJ Pelling QC granted an interim injunction to restrain the First Defendants (then described as ‘PERSONS UNKNOWN (being the individuals or companies who on 17 January 2022 unlawfully gained access to and removed from the Claimant's wallet ending 7456 Non-Fungible Tokens titled ‘Boss Beauties #680’ ‘Boss Beauties #691’) from dealing with or disposing of the Two NFTs. HHJ Pelling's order also provided that the Claimant could serve the Claim Form and his order on the First Defendants out of the jurisdiction and by an alternative means, namely service by email on Opensea, the Second Defendant, addressed to various Opensea email addresses.
8. Also on 10 March 2022 HHJ Pelling made a *Bankers Trust* disclosure order against Opensea. Opensea disclosed some email addresses, but the Claimant has received no answer to emails sent to those addresses. On 25 April 2022 Master Cook made an order by consent dismissing the Claimant's claim against Opensea.
9. The Claimant's Particulars of Claim are dated 28 March 2022. The causes of action pleaded against the First Defendants were unjust enrichment, misuse of private information and constructive trust.
10. HHJ Pelling continued his injunction on the return date, 31 March 2022. Lavender J granted an extension to that injunction on 12 September 2022.
11. As set out in three more reports, Mr Moore subsequently found evidence that:
  - (1) At some point before 26 August 2022 BB#691 was transferred out of the jawwn.eth User Wallet and through several intermediary wallets into the wallet referred to as ‘Wallet 8f3C’, which is associated with a certain social media handle and a certain email address (‘the Email Address’). There is evidence linking the Email Address with an individual by the name of Thembani Dube. Various social media posts suggest that Thembani Dube lives in South Africa.
  - (2) As at 26 August 2022, BB#691 was being advertised for auction on the Looksrare cryptoasset market place, with the auction set to remain open until 24 September 2022.
12. On 20 September 2022, Mitmark, on the instruction of Duane Morris, minted NFTs to be airdropped into the Wallet ending Cd32, E29269 User Wallet and Wallet 8f3C (the ‘Service NFTs’). The URL (which linked to a website hosting the redacted version of the service documents) can be seen in the front page of the cover

letters which were tokenised to create the Service NFTs, being accessible by the custodians of each wallet into which the Service NFTs were airdropped (i.e. only the front page of each letter was tokenised). The documents for service and full copies of the cover letters (noting that the same URL was used for each of the Service NFTs) were uploaded in folders specific to each wallet custodian. Where further documents were to be added, a new folder would be created thereafter. Prior to facilitating the airdrop, Mitmark had uploaded the redacted documents listed in the cover letter (including the order granted previously by Lavender J and the full cover letter) to the document repository.

13. The Service NFTs were airdropped into the Wallet ending Cd32 (at 14:50 UTC/15:50 BST), E29269 User Wallet (at 14:59 UTC/15:59 BST) and Wallet 8f3C (at 14:59 UTC/15:59 BST).
14. Also on 20 September 2022, the Claimant's solicitors served the Third Defendant, Mr Dube, with an unredacted version of the cover letter already served on Persons Unknown Category B by way of NFT along with the following unredacted documents via email: a) the order granted by Lavender J on 12 September 2022; b) the signed (but unsealed) Amended Claim Form (as lodged at Court); c) the signed Amended Particulars of Claim (as approved by Lavender J); d) the signed (but unsealed) Amended Application Notice (as lodged at Court); e) a Response Pack; and f) a Note of the Hearing on 12 September 2022. Mr Dube was also served with the following unredacted documents, via secure transfer: a) the Bundle from the Hearing on 12 September 2022; b) the skeleton Argument from the Hearing on 12 September 2022; and c) the authorities Bundle from the Hearing on 12 September 2022. The Claimant's solicitors had not received any response or contact from the custodians of the Wallet ending Cd32, E29269 User Wallet and/or Wallet 8f3C in advance of the hearing on 10 October 2022.
15. The Claimant's solicitors received sealed copies of the Amended Application Notice and Amended Claim form on 22 September 2022 and 26 September 2022. These documents, along with the Amended Particulars of Claim (as approved by Lavender J and filed at Court) were sent to Mr Dube via email by way of service on 26 September 2022. On 27 September 2022, the sealed Amended Application Notice, sealed Amended Claim Form and approved Amended Particulars of Claim were also uploaded (by Mitmark) to the website hosting the documents to which the URL in the Service NFTs directed in a new folder entitled 'Service Documents – 26 September 2022'. These further documents were therefore made available to the custodians of the Wallet ending Cd32, E29269 User Wallet and Wallet 8f3C by way of service.

16. It is not suggested that BB#680 has been removed from the E29269 User Wallet. Mr Recker (one of the Claimant's solicitors), in his second witness statement of 4 October 2022 confirmed that the NFTs appeared to still be located in the same wallets that they were in at the time of order granted by Lavender J – the E29269 User Wallet and Wallet 8f3C.
  17. In the same witness statement, Mr Recker also confirmed that NFT BB#691 was listed for auction on the Looksrare platform, due to expire on 25 September 2022, and was held by the custodian of Wallet 8f3C. There was some unusual activity surrounding BB#691 with three bids to purchase that NFT by the custodian of Novastar1 Wallet, notable since the Novastar1 Wallet held BB#691 for a short time on 13 July 2022, prior to transfer to Wallet 8f3C.”
3. The main development since then is the alleged onward transfer of Boss Beauties #691 allegedly by the Third Defendant in breach of the injunction and so it is alleged, in breach of constructive trust; specifically, it is alleged that it has been moved from the wallet ending 8f3C and is now held in a wallet numbered ending r3lax21.
  4. The matter comes before me now in relation to an application issued on 10<sup>th</sup> August 2023 whereby the Claimant seeks four things. She seeks permission to re-amend the Particulars of Claim, a further interim injunction, orders in relation to service, and permission to rely upon expert evidence.
  5. In support of these applications, the Claimant relies upon material previously before the Court plus the fourth and fifth witness statements of the Claimant, the second, third and fourth witness statements of Mr. Kent, solicitor for the Claimant. There is also an expert report from Christopher Cleary of M to M (Mitmark) Services, dated 23<sup>rd</sup> March 2023. Mr Cleary is an expert in tracing cryptocurrency tracing. I also have a report from Dr Chris Williams of Grant Thornton, accountants, dated 21<sup>st</sup> June 2023. I have considered all those materials and I have been assisted by counsel for the claimant, Ms. Muldoon. The application is made on notice, no reporting restrictions have been sought, and I have sat in open court. The Defendants have not attended and are not represented.
  6. I turn first then to deal with the re-amendments. A draft Re-Amended Particulars of Claim has been placed before the Court and the proposed re-amendments fall into a number of categories. First, there are factual updates providing additional facts relied upon with regards to the movement of Boss Beauties #691 since this matter was last before the Court: see in particular paragraphs 3A and 14 of the draft pleading. Next there are additional claims adding a new proprietary restitutionary claim as against Persons Unknown Category B: see paragraphs 16A and 16B. There is a new claim against Mr. Dube, the Third Defendant, for breach of constructive trust, in light of the apparent recent dealing in Boss Beauties #691. This is addressed at paragraphs 29A to 29E.
  7. There has, so it is said on behalf of the Claimant, been a change in the value of the Boss Beauties and the Claimant relies upon expert valuations substituting a claim value of £3,870-odd for £9,049-odd. This is supported by the valuation of Grant Thornton and is now set out at paragraph 16 of the draft Re-Amended Particulars of Claim. There are numerical changes amending the numbering of the Defendants. References to the Fourth Defendant are removed. He now becomes the Third Defendant, and the Third Defendant becomes the Second Defendant.

8. It was proposed that the definition of Persons Unknown Category B should be amended as to import knowledge or reasonable grounds to believe that the non-fungible tokens had been misappropriated. This, it seemed to me, ran contrary to the comments of Lavender J at paragraph 14 of his judgment. Having discussed it with Counsel in the course of this hearing, the point has been abandoned by the Claimant and is not now proceeded with. Next it is proposed that there should be amendments providing clarification as to how the claims in unjust enrichment are put as against each of the Defendants, including against Mr. Dube in light of the recent dealing in Boss Beauties #691. These are set out at paragraphs 17, 18A, 18C and 26 to 27B of the draft. Finally, there are other draft tidying up amendments mainly to paragraphs 7 and 13 and to the prayer.
9. The Claimant applies pursuant to CPR 17.1(2)(b) for permission to re-amend the Claim Form and the Particulars of Claim as I have described. The rule provides that if the statement of case has been served, the party may amend it only (a) with the written consent of all the other parties; or (b) with the permission of the court.
10. The Court has a broad discretion in relation to amendments at this stage of the proceedings. The case is at an early stage and has not yet reached the first case management conference. I see no reason why these re-amendments should not be allowed. I rely in particular upon the following matters. First, they arise from matters which have developed since the case was initially pleaded. Second, no prejudice is occasioned to the Defendants in that they have not yet engaged in the case at all and so there is no question of work being wasted or duplicated. Third, if the Claimant is not allowed to rely upon these new matters, then the Claimants will be prejudiced inasmuch as she would not be able to put her best case forward as she sees it. Fourth, there is no question of a period of limitation having expired and so CPR 17.4 is not engaged.
11. Accordingly, I permit the re-amendments in accordance with the draft attached to the application, subject to the changes that were agreed and discussed between the Court and Ms. Muldoon.
12. I turn then next to the question of the interim injunction. The position here is that there have been previous injunctions ordered in this case. The claimant now seeks an injunction in the terms set out in the draft order at tab 47 of the bundle. There is only one substantive change between the subsisting order and the one that was ordered by Lavender J and subsequently continued by Mr. Healy Pratt. The reason for the change relates to the transfer of Boss Beauties #691 from wallet 8f3c to wallet r3lax21. In my judgment, this should not affect the Court's overall approach and in my view, this injunction should be granted.
13. Three judges of this Court have already granted injunctions in this case, all essentially for the same reasons. I repeat here and adopt the reasoning of Lavender J at paragraphs 16 to 23 of his judgment and which address the test in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396:
  - “16. In form, the order which I was asked to make included injunctions against both the First Defendants and the Third and Fourth Defendants, prohibiting them from dealing with either of the Two NFTs in any way. In substance, however, I was really being asked to extend the injunction made by HHJ Pelling KC against the First Defendants so as to apply to the Third and Fourth Defendants.
  17. I concentrate, therefore, on the application for an injunction against the Third and Fourth Defendants. Subject to the issue as to jurisdiction, to which I will return, I considered that it would be appropriate to grant the injunction sought,

applying the principles laid down in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.”

18. I see no reason to depart from HHJ Pelling KC's conclusion, in paragraph 13 of his judgment of 10 March 2022 (cited as [2022] EWHC 2021 (Comm)), that there is at least a realistically arguable case that NFTs are to be treated as property as a matter of English law. I note that, amongst others, Bryan J reached a similar conclusion in relation to cryptoassets such as Bitcoin in paragraph 61 of his judgment in *AA v Persons Unknown* [2020] 4 WLR 35, as did Butcher J in paragraph 11 of his judgment in *Ion Science Ltd v. Persons Unknown* (unreported) 21 December 2000 and HHJ Pelling in paragraph 9 of his judgment in *Fetch.ai Ltd v Persons Unknown* [2021] EWHC 2254 (Comm).

19. I am satisfied that there is a serious issue to be tried whether the Third and Fourth Defendants hold one or more of the Two NFTs on constructive trust for the Claimant. There is evidence that the Two NFTs are property which was obtained by the First Defendants by fraud and which has been transferred by them in breach of trust and has been transferred into the hands of the Third and Fourth Defendants in circumstances which are, as yet, unexplained.

20. In paragraph 18 of his judgment of 10 March 2022, HHJ Pelling KC said as follows:

‘The next question that then arises is whether or not damages would be an adequate remedy so far as the claimant is concerned. I am satisfied that damages would not be an adequate remedy for two reasons. First, as things currently stand there is no information available concerning the standing of the persons unknown, and therefore, there can be no confidence that they have the means to meet even the relatively modest damages claim that is likely to arise in the circumstances of this case. The second reason why I am satisfied that damages are not an adequate remedy derive from the nature of the assets themselves. They are given a modest value in these proceedings of about £4,000, give or take. The evidence demonstrates, however, that these are assets which have a particular, personal and unique value to the claimant which extends beyond their mere ‘fiat’ currency value. The Court will readily grant injunctions to protect assets in such circumstances. In those circumstances, I am satisfied that the claimant has demonstrated to a realistically arguable level required that damages would not be an adequate remedy so far as she is concerned.’

21. I agree. I also agree with what HHJ Pelling KC said in paragraph 19 of his judgment:

‘As far as the persons unknown are concerned, I am satisfied that damages would be an adequate remedy in the sense that a cross-undertaking in damages is

offered by the claimant, and they have no reason to suppose that she does not have the means to meet any liability that might arise, because, of course, if there were any reasons to suppose that the cross-undertaking could not be honoured in full against any orders made by the Court subsequently, then it would be a material nondisclosure to reveal that fact.’

22. I add that the evidence from Mr Moore that BB#691 was being offered for sale suggests that whoever then possessed or controlled it did not regard it as having a value which extended beyond its financial value.

23. Applying the *American Cyanamid* principles, what I have said so far is sufficient to justify the grant of the injunction sought without considering the balance of convenience, but I agree with HHJ Pelling KC that the balance of convenience also favours the grant of the injunction.”

14. I too am satisfied that there is a realistically arguable case that non-fungible tokens be treated as property as a matter of English law. I am also satisfied that here is a serious issue to be tried, that is to say, namely whether, as between the Claimant and the Second and the Third Defendants, whether they hold one or more of the two NFTs on constructive trust, and as between the Claimant and the First Defendant whether there is a claim for restitution and unjust enrichment. I am further satisfied that damages would not be an adequate remedy for the Claimant, and that damages would be an adequate remedy for the Defendants. I consider that the Claimant has acted promptly and I consider that the balance of convenience favours the grant of the injunction.
15. I have considered the Claimant’s latest evidence in relation to her means to satisfy the cross-undertaking in damages. This is in her fifth witness statement dated 28<sup>th</sup> July 2023 and I am satisfied that she can meet her cross-undertaking. I therefore grant the injunction in the terms sought in the draft order.
16. I now turn to address the question of service out. The Claimant seeks orders for service out of the jurisdiction of the Re-Amended Particulars of Claim and the interim injunction. Orders have already been made in this case for service out of documents. Since the last order of this Court, there have been no substantive changes to the facts which affect whether proceedings may be served out. The jurisdiction of the Court in this case is founded on service of proceedings. Where, as here, it appears that the Defendants are outside the jurisdiction, the Claimant needs to show three things in order to serve the proceedings out of the jurisdiction. These are, first, that there is a serious issue to be tried; secondly, that there is a good arguable case that the claim falls within one of the gateways in Practice Direction 6B 3.1; and thirdly, that England and Wales is clearly the most appropriate forum.
17. Once again, these issues have already been considered in this case by HH Judge Pelling KC, Lavender J and Mr. Healy-Pratt, and again in my view it is neither necessary nor proportionate for me to consider them in depth again. Save for the disagreement between Lavender J and Judge Pelling, noted at Lavender J’s judgment at paragraph 36, the approaches of these judges are all aligned and I agree with and adopt them. (The difference at paragraph 36 of Lavender J’s judgment is not a material difference for my purposes, as it was not for him.)
18. It is, therefore, clear that there are serious issues to be tried between the parties. I have already identified what those are. I agree and I accept that England and Wales is the most appropriate forum: see Lavender J on this point at paragraph 25 and Mr. HealyPratt at paragraph 30. I further agree and accept that service out is justified on



the ground that there is a good arguable case that the claim passes through gateway 15(a) as against the First Defendant and 15(c) as against the Second and Third Defendants. I therefore give permission for service out in terms of the order as discussed and agreed in Court this morning.

19. I now turn to address service by alternative means. The Claimant seeks permission to serve the Re-Amended Particulars of Claim, the interim injunction and the previous documents in this case by an alternative method pursuant to CPR 6.15 and 6.27. Specifically, the Claimant seeks to serve by uploading password-protected documents to existing document repositories to which the Defendants are directed by non-fungible tokens already served on them.
20. Since the Third Defendant, Mr. Dube, may reside in South Africa, which is a Hague Convention state, there must be exceptional reasons to justify departure from the Convention scheme. Again, Lavender J and Mr. Healy-Pratt have already considered these issues in this case and have given permission for service by way of redacted documents to the existing document repositories. They expressly gave permission in relation to Mr. Dube. I refer in particular to the reasoning of Lavender J at paragraphs 45 to 50 which was followed by Mr. Healy-Pratt at paragraphs 42 to 46. I have considered in particular the reasoning Lavender J at paragraph 47. I agree with it and I adopt it.
21. The reason for the redactions were addressed by Lavender J at paragraph 49. It is essentially that the non-fungible tokens used to effect service would be open to the public and the hyperlinks contained within them could be used by anyone to view the documents served. The order then made makes plain that unredacted documents may be obtained by the Defendants by emailing the Claimant's solicitors and verifying their identities.
22. The change proposed today is that the Claimant has requested for the first time that the documents should be password-protected rather than redacted. The reasons for this are set out in the third witness statement of Mr. Kent, in particulars at paragraphs 33 to 34, where he says this:

“The purpose of this is twofold. First, it would save administrative time in that: (1) the Court and/or the Judge would not be required to approve further significant redactions (although for completeness, the October Injunction does not include a clear provision for Court permission to be sought for all redacted documents) and (2) the Claimant would not be required to prepare redacted and unredacted versions of substantive procedural documents, for example, a court bundle. Second, due to the nature of service by NFT, whereby the documents in the repository are publicly accessible, it would help to preserve the privacy of those involved in the dispute, including the Claimant”.

“No detriment or prejudice would be suffered by the Defendants as they would still be able to access the documents but it would just require them to obtain a password from this firm which we would provide upon them satisfying this firm that they are the relevant custodian of a particular wallet. Moreover, there is provision in the draft order for the Defendants to contact myself and my colleagues instructed in this matter directly by email to request documentation subject to verification checks to cater for scenarios where the documents cannot be accessed, such as where any technical issues are experienced”.

23. So what is proposed then is service of an unredacted cover letter which directs the recipient to password-protected documents. The recipient can obtain a password from the Claimant's solicitors upon providing satisfactory evidence of their identity. This seems to me to be a sensible proposal and I accept it. It seems to me to have the advantage of simplicity over the redaction process previously ordered and it avoids the need for debate between the Claimant and the Court as to the scope of any redactions. Having said that, I am not aware of any other case where service has been ordered in this way and Counsel could not direct me to any.
24. Nonetheless, I give permission for service by an alternative method in accordance with the terms of the draft order as discussed and modified at the hearing. To be clear, service is to be by way of password-protected documents and the documents themselves are not to be redacted.
25. I turn then finally to the question of expert evidence. The Claimant seeks permission to rely upon a report by M to M (Mitmark) Services Limited. This is a report of Mr Cleary, an expert who has considered what has happened to the Boss Beauties since they were lost. Secondly, she seeks to rely on a report from Grant Thornton which addresses the value of the Boss Beauties.
26. As I understand it, the Claimant seeks permission to rely upon these reports solely for the purposes of this hearing. The Claimant's counsel says that this is from an abundance of caution. As I understand it, whilst some expert evidence in the form of earlier reports by M to M have been placed before the Court, permission has not previously been sought. In my judgment, permission is not required at this stage. The Court is not making any final findings. CPR Part 35.4, as it seems to me, is directed to experts who produce Part 35 reports and do so for the trial or final hearing. It seems to me to be consistent with that requirement that an estimate of costs is required under CPR 35.4.2. So I do not think that permission is required now. I have, however, of course taken into account the expert evidence put before me today for the purposes of assessing the merits of this application.
27. Finally, since I am giving an *ex tempore* judgment in the absence of the Defendants and the Defendants may in due course apply to discharge the injunction or otherwise set aside the orders, I direct that the Claimant shall obtain an approved transcript of my judgment and to serve it on the Defendants in accordance with the directions given for service of other documents as soon as practicable.
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**(This Judgment has been approved by Neil Moody KC.)**

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