Neutral Citation Number: [2022] EWHC 2 (Ch)

Case No: BL-2021-000313

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 5/1/2022

Before:

MASTER CLARK

- -

Between:

TULIP TRADING LIMITED
(a Seychelles company) **Claimant**

- and -

(1) BITCOIN ASSOCIATION FOR BSV
(a Swiss verein)
(2) WLADIMIR VAN DER LAAN
(3) JONAS SCHNELLI
(4) PIETER WUILLE
(5) MARCO FALKE
(6) SAMUEL DOBSON
(7) MICHAEL FORD
(8) CORY FIELDS
(9) GEORGE DOMBROWSKI
(10) MATTHEW CORALLO
(11) PETER TODD
(12) GREGORY MAXWELL
(13) ERIC LOMBROZO
(14) ROGER VER
(15) AMAURY SÉCHET
(16) JASON COX **Defendants**

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John Wardell QC, Bobby Friedman, Sri Carmichael (instructed by **Ontier LLP**) for the **Claimant**
James Ramsden QC (instructed by **Bird & Bird LLP**) for the **2nd to 12th Defendants**
Matthew Thorne (instructed by **O'Melveny & Myers LLP**) for the **15th & 16th Defendants**

Hearing date: 25 November 2021

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Approved Judgment

I direct that this approved judgment, sent to the parties by email on 5 January 2022, shall deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

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Master Clark:

Applications

1. This is my judgment on two applications for security for costs made by:
   (1) Amaury Séchet and Jason Cox, the 15th and 16th defendants ("D15/16") – dated 7 September 2021;
   (2) the 2nd to 12th defendants ("D2-12") – dated 3 November 2021.

2. These defendants are all domiciled out of the jurisdiction. They have applied to set aside the order dated 8 May 2021 of Deputy Master Nurse granting permission to serve the claim documents on them out of the jurisdiction ("the jurisdiction applications"). Those applications are listed for a 5 day (including 2 days pre-reading) hearing before a High Court Judge from 28 February 2022.

3. The security applications seek security for the costs of the jurisdiction applications. The first defendant, Bitcoin Association for BSV, has acknowledged service stating that it intends to defend the claim, and does not therefore challenge jurisdiction. For the purposes of this judgment, I refer to the security applicants as the defendants.

Parties and the claim

4. The claimant is a Seychelles incorporated company, whose ultimate beneficial owners are Dr Craig Wright and his family. Dr Wright claims to have created the Bitcoin system under the pseudonym "Satoshi Nakamoto".

5. The defendants are open-source software developers who developed or improved the Bitcoin Core and Bitcoin Cash ABC software on a non-commercial basis.

6. The claimant claims to be the owner of about US$4.5 billion worth of digital assets ("the Bitcoin"), which were accessed and controlled by Dr Wright from his computer and network in England. In order to do so, Dr Wright used secure "private keys". These private keys were deleted (presumably after having been copied) by hackers who accessed Dr Wright's computer in February 2020. Dr Wright is now unable to access the Bitcoin.

7. The claimant's case is that the defendants owe fiduciary and tortious duties to it to re-write or amend the underlying software code to enable it to access the Bitcoin. It has asked them to take those steps. The defendants do not consider themselves to be under the duties alleged by the claimant and have refused to take the steps requested.

8. The key issues in the Claim are:
   (1) whether the claimant owns the Bitcoin;
   (2) whether the defendants have the ability to restore the claimant's access to and control of the Bitcoin in circumstances where the claimant has lost access to the private keys;
   (3) if the defendants do have such ability, whether they owe the claimant fiduciary and/or tortious duties to:
      (i) restore its access to and control of the Bitcoin, or
      (ii) at least take all reasonable steps to restore the claimant's access to and control of the Bitcoin, and
      (iii) take all reasonable steps to ensure that effect is not given to the fraud that has been perpetrated against the claimant by the hackers;
   (4) if such duties exist, whether the defendants have breached them; and
   (5) what relief the claimant is entitled to if the defendants are found to be in breach of their duties.

Evidence

9. The evidence in the security applications comprises:
   (1) 3rd witness statement of David Foster dated 2 September 2021 ("Foster 3") – in support of D15/16's application;
   (2) 4th witness statement of Oliver Cain dated 28 October 2021 ("Cain 4") - in answer to D15/16's application;
   (3) 4th witness statement of David Foster dated 12 November 2021 ("Foster 4") – in reply to Cain 4;
   (4) 4th witness statement of Sophie Eyre dated 3 November 2021 ("Eyre 4") in support of D2-12's application;
   (5) 5th witness statement of Oliver Cain dated 16 November 2021 ("Cain 5") - in answer to D2-12's application;

   although I was also referred to parts of the voluminous evidence in the claimant's application to serve out and the jurisdiction applications.

Legal principles

10. The applications are made under CPR 25.13(2)(a), which relevantly provides:

> "25.13— Conditions to be satisfied
> (1) The court may make an order for security for costs under rule 25.12 if–
> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
> (b)
> (i) one or more of the conditions in paragraph (2) applies,
> …
> (2) The conditions are–
> (a) the claimant is—
> (i) resident out of the jurisdiction; but

(ii) not resident in a State bound by the 2005 Hague Convention, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982

(c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;

…

(f) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 19, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so;

(g) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him."

11. These conditions and the order in which the defendants relied upon them can be conveniently summarised as:
    (1) the impecuniosity condition: CPR 25.13(2)(c)
    (2) the nominal claimant condition: CPR 25.13(2)(f)
    (3) the non-residence condition: CPR 25.13(2)(a)
    (4) the enforcement avoidance condition: CPR 25.13(2)(g).

12. The purpose of ordering security for costs is to protect the defendant (who is an involuntary party to litigation) against the risk that they may be unable to recover the costs of the claim brought against them: *Bestfort v Ras Al Khaimah* [2016] EWCA Civ 1099, [2016] 2 CLC 714 at [71].

Impecuniosity condition

Principles

13. The principles applicable to this condition can be summarised as follows:
    (1) The applicant must show that, on all the material presently available to the court, there is reason to believe that the claimant will be unable to pay the applicant's costs if ordered to do so: *Chemistree Homecare Limited v Teva Pharmaceuticals Ltd* [2011] EWHC 2979 (Ch) at [3];
    (2) Inability to pay means to pay when the costs fall due for payment: *Re Unisoft Group* (No 2) 1993 BCLC 532 at 534, approved in *Jirehouse Capita*l *v Beller* [2008] EWCA Civ 908; [2009] 1 W.L.R. 751 at [23];
    (3) This calls for an assessment of what the claimant may be expected to have available for payment at the due date or dates in the form of cash or other readily realisable assets: *Longstaff International v Baker and McKenzie* [2004] 1 WLR 2917 at [17] and [18]); *Autoweld Systems Ltd v Kito* [2010] EWCA Civ 1469 at [20] and [29];
    (4) The opening words "there is reason to believe" have the effect of watering down the obligation which follows. The defendant does not have to show on a balance of probabilities that the claimant company "will be unable to pay": 2021 White Book at 25.13.12; *Jirehouse Capital*;
    (5) The approach adopted should be simple and not "over-burdened by technical and semantic arguments relating to the construction of the 'threshold' test": *Bestfort* at [48];
    (6) Where a foreign company is reticent in revealing, or declines to reveal its financial position, it is "sound" practice to grant security against it: *Sarpd Oil v Addax* [2016] EWCA Civ 120; [2016] 2 Costs LO 227 (CA):

> "17. … If a company is given every opportunity to show that it can pay a defendant's costs and deliberately refuses to do so there is, in our view, every reason to believe that, if and when it is required to pay a defendant's costs, it will be unable to do so…
> 19. … even if deliberate reticence on the part of a respondent is not a breach of CPR 1.3, a court can and should take account of deliberate reticence as part of the overall picture. Any evaluation has to be made on the totality of the evidence before the court; part of that totality is the absence of relevant evidence from the only party who is able to provide it. If, therefore, there were to be a practice of the Commercial Court (as to which we cannot express a view from our own experience) that security for costs will often be granted against a foreign company who is not obliged to publish accounts, has no discernible assets and declines to reveal anything about its financial position, our view is that the practice is a sound one …"

Evidence as to claimant's ability to pay and "reason to believe"

14. On the claimant's own evidence, contained in Dr Wright's witness statement dated 29 April 2021 ("Wright 1") in support of the claimant's application to serve out of the jurisdiction:
    (1) the claimant is a "holding company" for the Bitcoin;
    (2) the Bitcoin is its "main asset";
    (3) it does not trade (this is confirmed at para 3 of the PoC), and so has no customers;
    (4) it has no bank account;
    (5) it does not file accounts or tax returns.

15. In addition, the defendants' unchallenged evidence is that the Seychelles is a jurisdiction in which corporations are required to provide little or no information about their business activities, and that no accounts or balance sheets are publicly available for the claimant.

16. Mr Foster (Foster 3, para 15) states that it is impossible to obtain information about the claimant's business activities, its assets or its ability to satisfy any costs orders against it; although he does not state what steps D15/16 have taken to try to obtain that information, other than searching publicly available records.

17. On 6 July 2021 D15/16's solicitors wrote to the claimant's solicitors:

> "Your client is a company incorporated in the Seychelles with no tangible assets, and there is every reason to believe that it will be unable to pay our clients' costs if ordered to do so."

18. The claimant's response, in its solicitors' letter dated 21 July 2021, was not to set out details of the assets it claimed to own, but to assert that D15/16 had not provided any

evidence of their contention. This position was maintained in the claimant's evidence: Cain 4, para 23.

19. The claimant's counsel sought to distinguish *Sarpd Oil* on the grounds that, in it, the claimant had been asked to provide evidence of good financial standing and had refused to do so. This he said contrasted with the present case, in which no such requests had been made. I do not accept this analysis of the correspondence: D15/16 having asserted that there was reason to believe that the claimant would be unable to pay their costs, the obvious response would have been to provide evidence of its ability to do so. In any event, even if the claimant was not given an opportunity in correspondence to show that it could pay the defendants' costs, it was certainly given that opportunity in these applications themselves. It failed to take up that opportunity. In my judgment, therefore, the claimant's position falls squarely within the "deliberate reticence" identified in *Sarpd Oil*.

20. It follows, subject to the proposal discussed below, that on the totality of the evidence, there is "reason to believe" that the claimant will be unable to pay the defendants' costs if ordered to do so.

Claimant's ability to access some of the Bitcoin in the near future

21. Cain 4 (at para 26) states that the claimant has strong prospects of being able to access some of the Bitcoin (said to be worth £13.7 million), referred to as "Bitcoin SV" ("the BSV"). A company called nChain Limited ("nChain") is said to be working on a modification to the existing BSV client software, which would enable someone who owns but cannot access the BSV to regain control of them. The release of this code would, it is said, enable the claimant to regain control of the BSV, thereby controlling ample assets to satisfy a costs order in favour of the defendants.

22. As to this, the BSV are an asset in issue in the claim, and the claimant's ownership of it is one of the issues. In particular, the BSV are, on the evidence, administered by the first defendant, which has, as noted, stated an intention to defend the claim. In order for the claimant to access the BSV, the first defendant would have to implement any software that Dr Wright or nChain develop, and it and its users would have to agree to use it. There is no evidence that they would do so. Indeed, it seems doubtful that they would do so, because such software could only properly be used if procedures were put in place to verify ownership independently of the private key. There is no evidence as to how this could be done, or whether the first defendant would be willing to undertake that burden.

23. In these circumstances, even if the software is available in the next few months, in my judgment, there is insufficient evidence to show that the claimant will be able to access the BSV.

24. Finally, the hearing of the jurisdiction applications is less than 3 months away. The claimant's evidence that it has "good prospects" of "soon" being able to access the BSV is not in my judgment sufficient where the security is required now to protect the defendants in respect of their costs of preparing for and being represented at those applications.

25. For these reasons, I conclude that the impecuniosity condition is satisfied. It is not therefore necessary to consider whether the other conditions are satisfied, but I do so briefly, in case of an appeal.

Nominal claimant condition

Principles

26. In *Compagnie Noga d'Importation et d'Exportation SA v Australian & New Zealand Banking Group Ltd* [2004] EWHC 2601 (Comm) at [115], Langley J held a "nominal claimant" to be "one whose name is used to bring a claim in which he does not have any or at least any significant legal or beneficial interest".

27. In *Chuku v Chuku* [2017] EWHC 541 (Ch) at [26] Newey J held that:

> "i) A person with a significant interest in the outcome of a claim will rarely, if ever, be considered a "nominal claimant" within CPR 25.13(2)(f);
> ii) A personal interest is not, however, essential. While a trustee, executor or personal representative will not be a "representative claimant under Part 19" merely because CPR 19.7A is in point, he still will not ordinarily be a "nominal claimant", regardless of whether he is also a beneficiary;
> iii) At least typically, there "must be some element of deliberate duplicity or window-dressing" for a person to be a "nominal claimant"".

Submissions and conclusion

28. The defendants relied upon the following matters in support of their submission that the claimant is a nominal claimant:
    (1) The claimant was purchased as a shelf company and only came under Dr Wright's control in October 2014;
    (2) Corporate documents relating to the claimant's incorporation were backdated (in October 2014) to 2011;
    (3) In Dr Wright's evidence, he speaks of the Bitcoin as being his: "although the assets were worth around £1bn at the time of the hack, that was (and is) only a portion of my overall holding in digital assets";
    (4) The claimant is merely an offshore vehicle for the interest of Dr Wright and his family, and the litigation brought by the claimant has been brought entirely for his or their benefit.

29. The precise position as to the interests of Dr Wright and his family in the claimant is set out in the claimant's evidence[1]. The claimant is wholly owned by a Seychellois company called Equator Consultants AG, which is in turn wholly owned by an Antiguan company called Strassen Limited. Strassen Limited is wholly owned by Dr Wright and his wife, Ms Ramona Ang. They hold the shares in Strassen Limited on behalf of a trust known as the Tulip Trust. The beneficiaries of the Tulip Trust are Dr Wright, his wife and their children.

30. On the evidence before me, it cannot be said that the claimant was incorporated or acquired for the purpose of bringing this claim. Its claim to ownership of the Bitcoin dates back to 2011. On the facts alleged by the claimant, it has a legal and beneficial interest in the Bitcoin, and therefore in the claim. Even if in some sense, it held the

[1] 1st witness statement dated 30 April 2021 of Oliver Cain ("Cain 1")

Bitcoin as trustee for the claimant, that of itself would not render it a nominal claimant. There is also no basis for alleging deliberate duplicity or window dressing.

31. In my judgment, therefore, the nominal claimant condition is not satisfied.

Non-residence condition

32. The issues which arose in relation to this condition are:
    (1) whether a company can be resident in more than one jurisdiction;
    (2) where the claimant is resident;
    (3) as to the meaning of the condition, in particular, whether the 2 limbs of the condition are cumulative or alternative.

Residence in more than one jurisdiction

33. Rule 173 of *Dicey, Morris & Collins* (15th edn) provides:

> "(1) The domicile of a corporation is in the country under whose law it is incorporated.
> (2) A corporation is resident in the country where its central management and control is exercised. If the exercise of central management and control is divided between two or more countries, then the corporation is resident in each of these countries."

34. The "central management and control" test derives from the speech of Lord Loreburn LC in *De Beers Consolidated Mines Ltd v Howe* [1906] AC 455 at 458:

> "In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. … The decision of Kelly C.B. and Huddleston B. in the Calcutta *Jute Mills v. Nicholson* and the *Cesena Sulphur Co. v. Nicholson*, now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides.
> …
> This is a pure question of fact, to be determined, not according to the construction of this or that regulation or byelaw, but upon a scrutiny of the course of business and trading."

35. In *Swedish Central Railway v Thompson* [1925] A.C. 495 (not cited by either side), the House of Lords held that a corporation may have more than one residence. At p501, Lord Cave after citing the above passage, said:

> "The central management and control of a company may be divided, and it may "keep house and do business" in more than one place; and if so, it may have more than one residence."

36. Although both sides referred me to various cases (none of which were directly in point), *Swedish Central Railway* is determinative of this issue, and I turn therefore to the factual question of where the claimant is resident.

Claimant's residence

Principles

37. *De Beers* was applied in *In re Little Olympian* [1995] 1 WLR 560, in which the relevant provisions (RSC Ord. 23) referred to the company being "ordinarily resident" out of the jurisdiction. At 568H, the judge lists various factors in the reported cases which have been taken into account and given different weights, but, as noted above, residence is a pure question of fact, focussed on the location of the central management and control of the company ("CMC").

38. Guidance as to how to approach this question of fact is found in *Revenue and Customs Commissioners v Development Securities Plc* [2020] EWCA Civ 1705 (which concerned the residence of a SPV/subsidiary) at [14]:

> "i) The overarching principle is that a company resides for tax purposes where its real business is carried on, and that is where CMC actually abides;
>
> …
>
> iii) It is the actual place of management, not that in which it ought to be managed, which fixes the residence of a company;
>
> iv) A company may be resident in a jurisdiction other than that of its incorporation not only where a constitutional organ exercises management and control elsewhere, but if the functions of the company's constitutional organs are usurped, in the sense that management and control is exercised independently of, or without regard to, its constitutional organs, or if an outsider dictates decisions (as opposed to merely proposing, advising and influencing decisions);"

Submissions and conclusion

39. The defendants relied upon the following factors in support of their submission that the claimant is resident in the Seychelles:
    (1) It is incorporated and registered in the Seychelles;
    (2) It submits annual return declarations in the Seychelles, in accordance with Seychelles' legislation;
    (3) It is obliged to maintain, and does file, certain accounts there; and failure to do so is subject to enforcement and penalty in the Seychelles;
    (4) It also has a "Registered Agent" outside the jurisdiction, as required by Seychelles' law;
    (5) It does not appear to have paid any tax in England;
    (6) There is no evidence as to where it has its registered office, from which, it is said, it should be assumed that it is not in England;
    (7) It is obliged by Seychelles law to maintain a register of its beneficial owners and its members, and keep them in its registered office in Seychelles.

40. The final factor relied upon by the defendants was that there is no evidence that Dr Wright has as a matter of fact exercised any real and practical control over the only

apparent asset of the claimant, namely the Bitcoin: on the claimant's case it has not moved the Bitcoin since it was acquired in 2011 (at a time when Dr Wright was not living in the UK).

41. The claimant relied upon the following factors in support of its submission that its CMC is in England:
    (1) The claimant is registered under the International Business Companies Act 2016 (Seychelles) ("IBC Act"); companies registered under the IBC Act ("IBCs") are intended for use outside Seychelles – this submission was supported by expert evidence in the form of a letter dated 22 October 2021 from a Seychellois lawyer;
    (2) Accordingly, although the claimant was incorporated in Seychelles, it was never intended that it would operate in that jurisdiction.
    (3) In fact, the claimant has never carried on business in Seychelles;
    (4) The laws and regulations governing IBCs in Seychelles (which are publicly available, and exhibited to Foster 4) provide that an IBC must keep a register of its members at its registered office in Seychelles, but it may keep its corporate records (e.g. minutes of meetings of its members and directors and written resolutions passed) and accounting records in any place outside Seychelles;
    (5) In fact, all the claimant's accounting and corporate books and records, except for the claimant's register of members, are kept at their designated location in England, at the home address (and office) of Dr Wright, and his wife, Ramona Ang;
    (6) Although the claimant has a registered agent in Seychelles, which provides corporate administration services such as filing documents with the registrar of companies, the day-to-day management and administration of the claimant is undertaken by Dr Wright, as the claimant's CEO, from his 3,000 square foot home office in England that is dedicated to the operations of the claimant and a related company;
    (7) Dr Wright resides in England and controls the claimant, as its CEO, from his home office in England, with no such corporate control ever having been exercised from Seychelles, where Dr Wright and Ms Ang (the claimant's CEO between 2015 and February 2020) have never even visited;
    (8) Until 31 December 2018, an IBC was not permitted to own or even lease immovable property situated in Seychelles, pursuant to section 5(2)(b) of the IBC Act. Accordingly, up until that date, the claimant was not permitted to have an office in Seychelles. An amendment to the IBC Act which came into force on 1 January 2019 means that an IBC may now own or lease immovable property situated in Seychelles, but it is not required to do so.
    (9) In fact, the claimant does not own or lease any immoveable property in the Seychelles;
    (10) The claimant's only (and therefore chief) physical office (dedicated to its affairs, as well as the affairs of another company) is Dr Wright's substantial home office in England.

42. Applying the principles set out above from *Development Securities* to the facts relied upon by each side (which are largely undisputed), it is, in my judgment, clear that no or no significant management and control of the claimant's affairs is carried out in the Seychelles. The acts relied upon by the defendants are purely administrative in nature, and as noted in *Dicey* (at 30-005), neither the place of incorporation nor the country in

which the CMC ought to be exercised are necessarily the place of residence of an overseas corporation. The test is where the CMC is actually exercised.

43. In this case, the only person who exercises CMC is Dr Wright, and he is based in England. The fact that the claimant has not taken any active steps in respect of the Bitcoin does not show that it does not have control of it – rather, that it has decided to use that control not to deal with it in any way. In my judgment, therefore, England is the place where the CMC of the claimant is exercised and accordingly its residence.

44. If I am wrong about that, and the administrative acts relied upon by the defendants amount to exercising management and control in the Seychelles, then, in my judgment, the acts done in England are sufficient for the claimant to be resident in both countries.

Meaning of condition

Submissions and conclusion

45. The defendants' primary submission (which I have rejected) is that the claimant is resident only in the Seychelles. Their alternative submission is that, if it is resident in both the Seychelles and England, the non-residence condition is nonetheless satisfied.

46. This interpretation of the provision requires residence out of the jurisdiction to be the primary condition, which if satisfied, is subject to the limited exception that the foreign country is a member of the Hague Convention. On this interpretation, since England is not a foreign country (although it is a member of the Hague Convention), the condition remains satisfied.

47. The claimant's interpretation on the other hand treats both conditions as independently requiring to be satisfied, so that the condition is to be read: "resident out of the jurisdiction; but **also** not resident in a State bound by the 2005 Hague Convention." On this reading, since England is a member of the Hague Convention, the condition is not satisfied.

48. Neither side cited any authority on this point. However, the defendants' interpretation is, in my judgment, contrary to the purpose of the security for costs provisions, which is to protect defendants who will be unable, or less readily able, to enforce a costs judgment against an unsuccessful claimant, because they will be unable to enforce in England. As the claimant's counsel submitted, if the defendants are correct, then security could not be obtained against a claimant who was resident in the Seychelles and an EU country bound by the Hague Convention, but could be obtained against a person resident in the Seychelles and England. Such an outcome cannot in my judgment have been intended by this legislation.

Enforcement avoidance condition

Principles

49. The purpose of this condition "is to prevent injustice to a defendant whether the assets available to enforce any order for costs they obtain have been or are being put beyond the reach of enforcement": White Book 2021, Vol. 1 at para 25.13.18. The paragraph goes on to give examples of such steps as being "the dissipation of assets, their transfer overseas or into the names of third parties, or their transfer or removal to places unknown to the defendant".

Submissions and conclusion

50. The defendants' counsel submitted as follows. First, the claimant's only assets are cryptocurrencies. Second, since those assets are held anonymously and are accessible only by means of a private key code, they are assets which are beyond the reach of enforcement (whether or not that was the original intention).

51. I do not accept that submission. The examples given in the White Book are all of positive acts by a claimant, reflecting the wording "taken steps in relation to his assets". By contrast, the claimant's purpose and function has always been to hold digital assets; and its decision to continue holding them cannot be reasonably construed as taking a positive step to put its assets beyond the reach of creditors.

Discretion: whether it is just to make an order

Principles

52. Where the impecuniosity condition applies, it will ordinarily be just to order security unless the claimant can show that do so will stifle the claim: White Book, para 25.13.1 citing *Premier Motorauctions Ltd (in liquidation) v PricewaterhouseCoopers LLP* [2017] EWCA Civ 1872, [2018] 1 W.L.R. 2955.

53. Similarly, the inability of the claimant company to pay the costs is a matter which not only opens the jurisdiction, but also provides a substantial factor in the decision whether to exercise it: *Pearson v Naydler* [1973] QB 609 at 906.

Submissions and conclusion

54. The defendants relied upon a number of factors, which I accept favour the grant of security. The most significant in my judgment is the absence of evidence that an order for security would stifle the claim. In addition, the policy underlying the security for costs regime (see para 12 above), applies all the more forcefully in this case where the defendants are private individuals, who are themselves out of the jurisdiction.

55. The defendants also submitted that the claim is thoroughly misconceived and without merit; brought on a flimsy jurisdictional basis; and not *bona fide*, but brought to "bankrupt" the defendants. As to the merits of the claim and its jurisdictional basis, these are not matters which it is appropriate to investigate in detail for the purpose of these applications. They will be considered in the jurisdiction applications, although I accept that the merits of the claim that the defendants owe the claimant the duties alleged are not on their face strong. As to whether the claim is brought in good faith, I was shown some very intemperate remarks on social media by Dr Wright, suggesting vengeful motives towards the defendants (and some intemperate remarks by the developers about Dr Wright); but motive is not sufficient to convert a claim which otherwise has legal merit into one brought in bad faith.

56. The claimant put forward two main bases as justifying refusal of security. The first basis is that its inability to access (at least some of) the Bitcoin is the result of the defendants' conduct in refusing to help it regain access, in circumstances where it has put forward a prima facie case that it is the owner of the Bitcoin and can no longer access or control it through no fault of its own.

57. I reject this as a factor favouring refusal of security. It is founded on two assumptions, namely ownership, and that the defendants owe the duties alleged, both of which may

be held to be incorrect at trial. That is the outcome which gives rise to the need for the protection the defendants seek. Even if the claimant's case as to ownership is as strong as it asserts, the same cannot be said for its case as to the existence of the duties said to be owed by the defendants. It cannot at this stage be inferred that the claimant's inability to access the Bitcoin is the fault of the defendants.

58. The second basis is that the claimant has made an open offer (on 19 October 2021) to transfer some of the Bitcoin (on the BCH ABC blockchain) to be held by a trusted third party pending the outcome of the claim. This proposal would involve the defendants writing new software code to transfer that Bitcoin, which would then be frozen and used as security. However, for the following three reasons advanced by the defendants, this is not, in my judgment, a proposal that meets the need for security for their costs:
    (1) The security will only be needed if the claimant has to pay costs: in the usual case, if it loses. But if it loses, it will have no legal right to the Bitcoin it suggests should be segregated for security. In those circumstances, that Bitcoin would not be an asset belonging to the claimant against which the defendants could enforce a costs order.
    (2) The proposal assumes that the defendants could legally and legitimately segregate and transfer the Bitcoin. That is an issue in the proceedings, and the assumption cannot therefore be the basis of the proposal.
    (3) Even if it was technically possible, the proposal would require the defendants to expend their own time and resources in re-writing the relevant software code and persuading users of the Bitcoin system to adopt those changes. Whether this can be achieved is an extremely technical issue in dispute in the claim. However, there is no legal basis (and the claimant did not put forward one) for requiring a defendant to expend his own time and money in order himself to produce his own security.

Conclusion

59. For the reasons set out above therefore, I will order the claimant to provide security for costs, with the quantum to be determined, if it cannot be agreed, at the next hearing.