IN THE HIGH COURT OF JUSTICE BL-2021-000313
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
BETWEEN:

TULIP TRADING LIMITED

Claimant

and

(1) BITCOIN ASSOCIATION FOR BSV

[redacted]

Defendants

SECOND TO TWELFTH DEFENDANTS' SKELETON ARGUMENT FOR THE HEARING ON 3 OCTOBER 2023

References to documents in the hearing bundle are made in the form ***{Section/Tab/Page}****, references to documents in the pleadings bundle are made in the form* ***{PB/Tab/Page}*** *and references to paragraphs of witness statements in the form e.g. Elliss 1 ¶12.*

If time permits, the Court will be assisted by reading the skeleton arguments, together with Elliss 1 {B/2/13}, Elliss 3 {B/8/919}, and Lee 1 {E/2/985}. It is expected that this pre-reading will take approximately 90 minutes.
Time estimate for hearing: Half a day

A. INTRODUCTION

1. This is the hearing of the Claimant's ("**TTL**") application to strike out certain paragraphs of the evidence relied on by D2-12 (**'the Enyo Defendants'**) in an application seeking directions for a preliminary issue trial (**'the PI Application'**).

2. This strike out application is misconceived but it is also a grossly disproportionate waste of the court and parties' time and resources. The Court has already read the relevant evidence and will need to consider it in detail for this application. There is no issue in this application which could not have been dealt with by the Court reading the material *de bene esse* at the hearing of the PI Application, and ruling on its relevance and/or admissibility at that stage.

3. The relevant evidence was originally divided into two categories which C criticised on different grounds, which it refers to as the 'Hollington material' and, tendentiously, the 'Irrelevant Material'. However, as explained further below, TTL has now abandoned its application to strike out the latter material.

4. In summary, the Enyo Defendants' position is:

    4.1 The so-called Irrelevant Material is not irrelevant, for two reasons:

        (a) First and foremost, D2-D12 will be inviting the Court to exercise its discretion to order the trial of preliminary issues on the ground that the claim is advanced fraudulently because TTL is well-aware that it does not own the relevant assets and that TTL (specifically, Dr Wright on its behalf), has forged or doctored evidence to support the claim. Those are serious allegations which should not be made lightly, and are not made lightly by the Enyo Defendants. It is right that the Court is able to consider whether such serious allegations are properly made and consider, in the exercise of its discretion and the exercise of its inherent jurisdiction to

safeguard its own processes and procedures, the cogency of the evidence that a fraud is being attempted on the Court and on the Defendants.

(b) Furthermore, on the orthodox application of the factors identified in **Steele v Steele** [2001] CP Rep 106 and other authorities as being relevant to the decision whether to order a preliminary issue, it is necessary for the Court to have a proper understanding of the likely factual disputes in the preliminary issue. Evidence outlining those issues is therefore clearly both relevant and admissible.

4.2 As to the 'Hollington Material':

(a) This material is relevant for the same reasons as the so-called "Irrelevant Material". It supports the conclusion that there is a *prima facie* case that Dr Wright and TTL are bringing this claim dishonestly, knowing that TTL does not own the Digital Assets (defined below) for which it sues, and that they rely on forged documents to do so. This evidence, while some (but not all) of it would be inadmissible at trial, is admissible at this interlocutory stage to assist the Court in assessing the *prima facie* strength of that case before disclosure and before all the evidence of fraud and forgery which will be available at trial can be marshalled.

(b) It is common ground that in line with the long-standing authority in **Hollington v Hewthorn** [1943] K.B. 587, other conclusions reached by judges in cases not between the same parties (or their privies) will not be admissible as proof of the accuracy of the findings made at trial. However, it is also well-established that such findings are relevant and admissible to establish that there is a prima facie case of fraud that needs to be determined by the Court and, as potentially relevant to the Court's exercise of discretion, the apparent strength of that case. The judgments are also admissible as hearsay evidence of the facts recited in the judgments.

5. Accordingly, TTL's application is simply misconceived as a matter of law.

6. In any event, this is an inappropriate application. As the authorities addressed below show, it is not an appropriate case management exercise for the Court to be asked to undertake a line-by-line redaction exercise striking out individual passages of evidence

and specific sections of exhibited documents, even if they were technically inadmissible or irrelevant. Establishing the precise boundaries of what is relevant and/or admissible is a highly fact-sensitive exercise that is far more efficiently done by the Court when it hears the actual application and is in a position to assess what is and is not relevant to its decision. Thomas LJ (as he then was) addressed the point in **Secretary of State for Business, Enterprise and Regulatory Reform v Aaron** [2009] Bus LR 809 at [39], in the context of expert evidence:

> "It is my experience that many experts report views on matters on which it is for the court to make its decision and not for an expert to express a view. **No modern or sensible management of a case requires putting the parties to the expense of excision; a judge simply ignores that which is inadmissible."** (emphasis added)

7. When subjected to any proper scrutiny, it rapidly becomes apparent that TTL's proposed redactions are inconsistent and go beyond the scope of the objections set out in the supporting evidence. The Court has already read all of the material in Elliss 1 for the hearing on 15 August 2023, it will have to do so again for this hearing. Both this application and the preliminary issue applications are to be dealt with by the same assigned judge. In such circumstances, there is absolutely no justification for requiring the parties or the court to undertake a line-by-line review of the evidence in advance of the actual hearing of the application. If there is any genuine basis for criticising the relevance or admissibility of the evidence (which, for the reasons set out below, there is not), then that is a matter which the Court can and should address on the hearing of the Preliminary Issue Application itself. That is now the stance adopted by TTL in respect of what it terms the 'Irrelevant Material', and should have been the approach taken to all of the material from the outset.

B. THE ACTION

8. TTL is a Seychelles company which (as is common ground) is ultimately controlled by Dr Craig Wright. Dr Wright is an individual best known for claiming (falsely, on the case of the Enyo Defendants) to be "*Satoshi Nakamoto*", the inventor of Bitcoin.

9. The Enyo Defendants are all private individuals, software developers who have had involvement in Bitcoin and who have contributed to the development of the so-called "*Bitcoin Core software*" at different times and in different respects: Elliss 1 ¶14 **{B/2/17}**.

10. The nature of the dispute which is the subject of this action is summarised at Elliss 1 ¶15-27 **{B/2/17-20}**. In very bare summary:

10.1 TTL claims that it was (and is) the owner of Bitcoin with a value of several billion pounds (the "**Digital Assets**"), held at two blockchain addresses (the "**Addresses**") for which neither it nor Dr Wright now has the private keys.

10.2 TTL says that it lost the private keys in February 2020, when Dr Wright was hacked by persons unknown.

10.3 TTL pursues novel legal claims, that the Enyo Defendants (and others) owe it fiduciary and common law duties in light of their alleged control over the Bitcoin system, pursuant to which they are obliged to provide it with access to and control over the Digital Assets, and in the alternative claims equitable compensation, an account or damages.

11. This dispute, therefore, is an attempt by TTL and its owner (or owners) to gain control of US$4.5 billion in assets. There is a vastly valuable prize on offer.

12. The claim raises a large number of exceptionally complex issues about the architecture and functioning of the Bitcoin blockchain and other related networks, about the roles which the Defendants play in relation to the blockchain, and about what, if any, English law duties fall to be imposed. It is common ground that this action (if tried in its entirety) would lead to a long (between 8 and 12 weeks), complex and demanding trial.

13. However, the Enyo Defendants' position is that this entire claim – and therefore this action – is a fraud. Dr Wright and TTL are not and never have been the owners of the Digital Assets, Dr Wright (and therefore TTL) know that they are not and have never been the owners of the Digital Assets, and this claim is pursued deliberately on the basis of that falsehood in order to seek to use legal proceedings before this Court as a means of grabbing an enticing US$4.5 billion pot.[1] This issue of fraud is squarely pleaded by the Enyo Defendants, including as follows:

13.1 Enyo Defendants' Defence ¶1 **{PB/5/71}**:

[1] There is also concern that TTL's intention is to harass the defendants, who have not supported Dr Wright's claim that he is Satoshi Nakamoto, the creator of Bitcoin: see paragraph 15 below.

"This is a fraudulent claim. TTL does not own the digital assets it claims to own in these proceedings and has never owned them. As particularised at paragraph 30 below, TTL has made a deliberately false claim to ownership of these assets and has commenced these proceedings knowing that it has no claim in respect of those assets. The claim is accordingly an abuse of the Court's process."

13.2 Enyo Defendants' Defence ¶30 **{PB/5/85}**:

"It is averred that this claim is an abuse of process because it has been brought by TTL fraudulently in the knowledge that it has no claim. As to this:

30.1. As pleaded at paragraph 54 below, Dr Wright and TTL do not have and have never had an interest of any kind in the digital assets in the Addresses.

30.2. Dr Wright and TTL must, necessarily, have known this and did know it.

30.3. In the premises, this claim is an abuse of process because Dr Wright and TTL have known at all material times that TTL has no claim."

14. The Enyo Defendants also say that this fraud (on the Defendants and the Court) is to a very significant extent founded on placing before this Court forged documents: see e.g. Enyo Defendants' Defence ¶54.2 **{PB/5/95}**; and that Dr Wright has a long record of producing and relying on forgeries ¶54.9 **{PB/5/96-98}**.

15. The Enyo Defendants also say that the object of this fraud is not merely to pursue the claims in this action, but to use the processes of this Court fraudulently to harm the Defendants, irrespective of the outcome of the action. As Elliss 1 ¶97.6 **{B/2/43}** explains:

"Dr Wright's open desire to use these proceedings to ruin the lives of the Enyo Defendants is well publicised. Dr Wright has openly posted about his intentions on Twitter, for example "I will personally hunt every dev until they are broke, bankrupt and alone before I lost" and "[t]he cases will be like a lottery. Most BTC devs will fold. A few will be bankrupted, lose their families and collapse""

C. THE PRELIMINARY ISSUE APPLICATION

16. The Enyo Defendants' Preliminary Issue Application is founded on their closely connected contentions that: (1) TTL is not and never has been the owner of the Digital Assets; (2) TTL and Dr Wright know that TTL is not and never has been the owner of the Digital Assets; (3) TTL's case is founded on forged documents; (4) TTL's case is put forward fraudulently; and (5) this claim is an abuse of the process of the Court.

17. To be clear: although legally the question of whether TTL was or is the owner of the Digital Assets would not require the determination of the other issues set out above, on the facts of this case the determinations will be inseparable. The nature of TTL's claim and the way in which it is pursued mean that if it is determined that TTL was not the owner of the Digital Assets, that will be something which TTL and Dr Wright knew when pursuing these claims and their conduct in pursuing the claims will be an abuse of process.

18. The Enyo Defendants therefore consider that it is appropriate that these issues should be determined at a preliminary trial, separately from the remainder of the issues in this action, and this is the subject of their Preliminary Issue Application.

19. The Enyo Defendants say that their Preliminary Issue Application is appropriate on two grounds, which are connected but different. They are that:

    19.1 The determination of the question of whether TTL owns the Digital Assets (the "**Ownership Issue**") is appropriate for preliminary issue trial on the basis of the standard criteria set out in **Steele v Steele** [2001] CP Rep 106: see Elliss 1 ¶97 **{B/2/42-44}**; and

    19.2 The question of whether or not TTL's claim is fraudulent, an abuse of process, and therefore one which ought to be struck out, is an issue which by its nature ought to be determined as a preliminary issue: see Elliss 1 ¶5 **{B/2/14}** and ¶29.1 **{B/2/21}**.

20. The Enyo Defendants do not, of course, ask this Court to determine that they are correct on either of those points, but it is important to the issues which are before the Court to have in mind that the Enyo Defendants rely on both of those arguments.

21. The Enyo Defendants have always relied on both the points identified above. In making their Preliminary Issue Application, Elliss 1 ¶5 **{B/2/14}** explained that:

> "The Enyo Defendants seek to have this claim struck out on the ground that it is a fraudulent claim and an abuse of process. They seek disclosure and other case management directions to enable this threshold issue of fraud to be determined as a preliminary issue."

22. The Enyo Defendants also explained this in correspondence, in their letter of 24 July 2023, saying "*The reference to abuse of process and strike out [in Elliss 1] is a reference to the consequences of finding that the Claim was brought fraudulently following*[2] *a trial of the Ownership Issue*" **{H/14/1467}**.

23. In their draft Order, the Enyo Defendants previously proposed a direction that "*There shall be [a] preliminary issue trial in these proceedings on the following issue. Does TTL own, and did it own at the time of the Alleged Hack, the Bitcoin in the Addresses*": **{B/4/792}**. For the reasons explained above, in making that substantive determination, the Court would necessarily also be in a position to determine both that Dr Wright and TTL knew that TTL did not own the Digital Assets, and that TTL's claim would be fraudulent and abusive. The Enyo Defendants therefore consider that the Court at the Preliminary Issue Trial would have been seised of those issues, as they intended and explained in Elliss 1.

24. However, in TTLs' evidence in support of its Strike Out Application, it is said that this is confusing: see Lee 1 ¶20 **{E/2/990}**, because the further determinations which would follow from a finding that TTL did not own the Digital Assets are not sought expressly in the Application Notice or Draft Order.

25. Accordingly, in order to ensure there can be no confusion, the Enyo Defendants served a further draft Order (a copy of which was attached to the Enyo Defendants' skeleton argument for the hearing on 15 August 2023) in which they amended the issues for determination at the proposed preliminary issue trial to provide as follows **{B/5/798}**:

> "There shall be preliminary issue trial in these proceedings on the following issues:

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[2] In fact, this should refer to the position <u>at</u> or following a trial of the Ownership Issue.

(1) Does TTL own, and did it own at the time of the Alleged Hack, the Bitcoin in the Addresses (the '**Ownership Issue'**)?

(2) Did TTL commence these proceedings knowing that it does not own the Bitcoin in the Addresses?

(3) Is the claim brought by TTL fraudulent and an abuse of process?"

26. At the hearing of their Preliminary Issue Application, the Enyo Defendants will be asking the Court to direct that these issues are determined at a preliminary issue trial.

27. To avoid any further procedural debate about the scope of the Enyo Defendants' application, the Enyo Defendants have made an application dated 27 September 2023 for an order amending box 3 of the original application notice so as to correspond precisely with the draft order served in August. By a letter dated 1 October 2023, TTL confirmed that it consented to that application to amend, while maintaining its opposition to the proposed preliminary issues. The Court is accordingly invited to exercise its discretion to amend the application notice under CPR 3.1(m).[3] The amendment is made simply to address the technical procedural point which TTL's evidence for this application has raised about the existing N244 application notice. There is no change in the substance of the Enyo Defendants' position and no change to the draft Order which was served in August, and reflects the position which was stated at the outset in Elliss 1, which is that the Enyo Defendants *'seek to have this claim struck out on the ground that it is a fraudulent claim and an abuse of process'*, and *'seek disclosure and other case management directions to enable this threshold issue of fraud to be determined as a preliminary issue'*.[4]

28. The Court will note that the draft order does not contain any provision striking out the claim. That reflects the fact that the Enyo Defendants have applied for the trial of preliminary issues on the interconnected issues of ownership and fraud, and the draft order accordingly provides for directions to trial. The Enyo Defendants consider the question of whether the claim should be dismissed on the merits or struck out as an abuse is a matter for the trial judge to determine, either (most likely) at a consequential hearing following judgment on preliminary issues, if the Court does make findings that

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3 see **Naibu Global International Co Plc v Daniel Stewart and Co Plc** [2021] P.N.L.R. 4 at [42]-[43], citing **Agents Mutual Ltd v Moginnie James Ltd** [2016] EWHC 3384 (Ch).

4 See paragraph 21 above.

the claim has been advanced fraudulently, or (perhaps) during the course of the trial (as might be the case if, for example, the extent and nature of Dr Wright's fraudulent conduct rendered a fair trial of the ownership issue impossible).

D. RELEVANCE OF EVIDENCE ON THE MERITS OF ALLEGATIONS OF FRAUD

29. As noted above, TTL has now abandoned its attempt to strike out some of the material in Elliss 1 as irrelevant, although it maintains the position that it is irrelevant for the purpose of the hearing of the Preliminary Issue Application. The only material which it now seeks to have struck out is the *Hollington* Material. Both categories of evidence go to the same issue, which is to evidence the very strong *prima facie* case that the claim is a fraudulent fabrication and that TTL is advancing this claim despite knowing that it has no proper claim to the Digital Assets.

30. Because of this, it will assist the Court in considering the admissibility of the *Hollington* Material to understand the wider relevance of the evidence demonstrating a clear prima facie case of fraud.

31. As noted above, the Enyo Defendants put their application for a preliminary issue on two grounds: that the determination of the question of ownership is suitable for determination as a preliminary issue on the ordinary principles, and that the question of whether the claim is being advanced fraudulently is an issue which, for the protection of the court's procedures, ought to be determined as early in the proceedings as possible, rather than only after the claim has reached trial. The evidence contained in Elliss 1 as to the merits of the allegations (including the Hollington Material) are relevant in establishing both of those points.

32. The Enyo Defendants contend, in their Preliminary Issue Application, that the issue of ownership, and the interlinked issue of whether ownership is being fraudulently claimed by TTL and Dr Wright, should be determined as soon as possible because of the serious issues as to whether this claim is being advanced fraudulently. In short:

    32.1 Deliberately advancing a false claim and/or relying on falsified evidence can constitute an abuse of process: see e.g. **Fairclough v Summers** [2012] 1 WLR 2004 at [41] and **Arrow Nominees v Blackledge** [2000] 2 BCLC 167.

32.2 Where it is alleged that there is an abuse of process, that is a matter which ought to be determined as early as possible in the proceedings: see e.g. **Masood** at [74], **Summers** at [39]. The issue of abuse should only be left to a trial where the evidence to be heard at the trial is necessary to establish the fraud, forgery or other abuse. A claimant who is acting abusively should, where possible, be prevented from causing any unnecessary waste of resources in the determination of proceedings which it is pursuing abusively.

32.3 As explained in Elliss 1, the Enyo Defendants recognise that the question of whether TTL is advancing this claim fraudulently will require the Court to consider the evidence which is alleged to show TTL's ownership of the assets in detail, as well as hearing oral evidence. In the interests of efficient case management, the Enyo Defendants have framed their application as an application for a preliminary issue, so that (unlike in a strike out application) there is no question of the Court having to undertake that analysis of the evidence twice.

32.4 The fact that the application is framed as a preliminary issue does not detract from the importance, emphasised in the authorities above, of promptly identifying a fraudulent claim.

33. As the Enyo Defendants noted in their skeleton for the hearing on 15 August 2023,[5] the Court is not being asked to rule on the submissions above at this hearing – that is a matter for the hearing of the Preliminary Issue Application. However, it is submitted that it is – to say the very least – plainly an arguable application. Given that it is plainly arguable, the Enyo Defendants are entitled (and obliged) to lead evidence in support of their contention that there is cogent evidence indicating fraud which is a compelling reason for dealing with the Ownership Issues at an early stage, rather than only at the conclusion of a long trial.

34. Clearly, to understand the practicalities of addressing an issue of fact as a preliminary issue, and to understand its impact on the case as a whole, it is relevant for the Court to consider what the allegations are and to have, at least in outline, an indication of the case that is likely to be advanced at any preliminary issue trial.

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35. The same evidence – giving the Court an indication of the subject matter and scope of the factual dispute – will also go to other elements of the analysis, including the scope of overlap with any final trial (and therefore the costs implications of a preliminary issue trial).

36. Moreover, the strength of a party's case on an issue may very well be relevant to Neuberger J.'s tenth factor, which is the overall exercise of discretion in light of the Overriding Objective. If an applicant's proposed issue is in theory potentially decisive of the claim, but in practice very unlikely to succeed, then that is clearly relevant to the question of how likely the issue is to be dispositive, the question of how likely a preliminary issue trial is to increase rather than decrease costs and delay, and to the overall exercise of discretion. Where, as here, the preliminary issue which is advanced entails the assertion that TTL is fraudulent, it is submitted that it is plainly relevant for the Court to be apprised of the evidence which shows that this allegation is properly founded.

37. There are three relevant categories of evidence going to the *prima facie* case of fraud and abuse. In summary, they are as follows.

38. First, there is the material which TTL refers to as the "Irrelevant Material". This is material set out in Elliss 1 which summarises the evidence which shows directly that Dr Wright and TTL never had any interest in the Digital Assets, and that the claim is fraudulent. As set out above, the application to strike out this material has now been abandoned and the Enyo Defendants will rely on this material at their Preliminary Issue Application.

39. Second, there is the so-called "Hollington Material". This is also set out in Elliss 1. The material is varied. Some of it refers to the assessment of Dr Wright's honesty in other proceedings: see e.g. Elliss 1 ¶32 **{B/2/21-24}**. Some of it refers to previous consideration of Dr Wright's assertions that he had owned the Digital Assets, and the circumstances in which he has deployed his claims to own those assets: see e.g. Elliss 1 ¶55-56 **{B/2/32}**. All of it is relevant to the assessment at this interim stage of whether a Court at trial may conclude – as the Enyo Defendants say it should – not just that TTL is not the owner of the Digital Assets, but that TTL and Dr Wright have made that claim fraudulently and on the basis of falsified documents.

40. Third, in addition to the matters referred to in Elliss 1, further material has come to light very recently which the Enyo Defendants will say reveals that Dr Wright has been engaged in fabrication of documentary evidence and a deliberate attempt to mislead the Court in evidencing TTL's ownership of the Digital Assets. This evidence is addressed in the third statement of Mr Elliss ("**Elliss 3**") dated 27 September 2023 **{B/8/919}**. In particular:

40.1 The Court will recall that in seeking to establish TTL's ownership of the Digital Assets, it relies on two key pieces of 'evidence.' They are:

(a) A Purchase Order which the Enyo Defendants say is a forgery for the reason summarised in ¶¶38-43 of Elliss 1 **{B/2/25-28}**); and

(b) Financial data held in accounting software, including 'Mind Your Own Business' or 'MYOB'. TTL's case is that contemporaneous MYOB records show companies associated with Dr Wright owned the Bitcoin in the 1Feex Address on 26 February 2011.

40.2 TTL's reliance on data from MYOB is conveniently summarised in the witness statement of Oliver James Cain, of TTL's former solicitors, which TTL relied on for the purpose of obtaining service out of the jurisdiction, at paragraph 106.1. Mr Cain stated:

> "The MYOB records show that an entity related to Dr Wright recorded the receipt of 79,956 bitcoin as inventory on 26 February 2011 (i.e. the Bitcoin in the 1Feex Address)..."

40.3 However, the MYOB evidence on which TTL relied was not native in form, it was in the form of screenshots and data downloads provided to forensic accountants instructed on behalf of TTL. It has very recently become clear that the MYOB records on which TTL relied were falsified and that the reliance on them was fraudulent.

40.4 During the course of other proceedings (*Crypto Open Patent Alliance v Craig Wright* (Claim No. IL-2021-000019), Dr Wright disclosed an email (referred to as the Shadders Email) which contains an attachment with an export of the MYOB data in native format.

40.5 As Elliss 3 explains, the native MYOB file allows the extraction of a Journal Security Audit and a Security Session Report, which respectively contain details of when relevant transactions were entered into the MYOB software and who has logged on to the software at various times. Those reports show that the relevant evidence on which TTL relies were not contemporaneous, but were entered onto the system by Dr Wright himself in March 2020, shortly before the document was provided to TTL's expert, Alix Partners.

40.6 This is yet further evidence that documentation which TTL relies on as an authentic record of ownership has been created or manipulated by Dr Wright and/or TTL. The steady discovery of further evidence of fraud and falsification of documents by TTL demonstrates the very real prospect of there being yet further evidence of fraud and falsification available at the trial of a preliminary issue, once disclosure has taken place in these proceedings.

41. The evidence in Elliss 1 and Elliss 3 outlines that there are serious issues to be tried as regards ownership and fraud, and that there is a very real prospect of the proposed preliminary issue bringing the matter to a conclusion without needing to occupy up to ten weeks of court time and force the parties to incur millions of pounds of costs in preparing for trial. That is clearly relevant to the Court's consideration of the application.

42. The Court may find it of assistance to note that the MYOB records were referred to in Elliss 1. At ¶49.5 **{B/2/30-31}**, it is explained that:

> "Whilst the Enyo Defendants have not yet had the opportunity to examine the MYOB records, counsel for the Plaintiffs in proceedings in Florida where Dr Wright deployed these same records noted "*significant red flags*" including that "*the production included file types, such as "docx" that appear to be unsupported by MYOB's export function, and metadata for many of the documents shows a different law firm, SCA Ontier which represents Defendant and his wife as the creator of the documents*"."

43. This paragraph is one of the statements which TTL asked the Court to strike out as so-called "Hollington Material". This illustrates why – as explained below – discussion and conclusions in other courts and Tribunals are admissible at the interlocutory stage.

44. It is only by chance that the Enyo Defendants have become aware of the evidence of Dr Wright's falsification of the MYOB documents prior to the hearing of their preliminary issue application.

45. If TTL had succeeded in striking out Elliss 1 ¶49.5, the court might been prevented from having any indication that the MYOB records might turn out to be falsified. One purpose of the admissibility of such material at the interim stage is to indicate the possibility – and, in fact, likelihood – of further evidence admissible at trial being available following disclosure, and therefore to allow the court proper information on which to make its interlocutory decision.

E. HOLLINGTON V HEWTHORN

46. TTL's application to strike out the Hollington Material seeks the redaction of sections of Elliss 1, and a significant proportion of the exhibit to Elliss 1, on the ground that it impermissibly refers to the conclusions reached by other judges in proceedings involving Dr Wright.

47. There are two fundamental legal objections to TTL's application on this ground.

47.1 Firstly, evidence of the conclusions reached by other judges, although not admissible to determine the merits of a claim on summary judgment or at trial, is admissible at the interlocutory stage where it is relied on to establish that there is a substantial issue between the parties (for example, that a claim of fraud has been properly pleaded, or that a claim presents a serious issue to be tried).

47.2 Secondly, the judgments are admissible at trial as a factual record of the facts recited therein, and TTL's attempt to have all mention of the judgments and all copies of them excised would be inappropriate even at trial.

E1. Use of judgments and other decisions at the interlocutory stage

48. The authorities demonstrate clearly that even where judicial and other findings are inadmissible as to the truth of those matters (whether at trial or for summary judgment), the same findings may be used at the preliminary stages of the proceedings in establishing that there is a serious issue which the Court should consider.

49. In **Medcalf v Mardell** [2003] 1 AC 120, the House of Lords considered a wasted costs order made against two barristers who had alleged fraud on what was said to be an improper basis. In addressing these issues, the House of Lords considered the type of evidence on which counsel could properly rely to justify their pleading of fraud. Lord Bingham of Cornhill addressed the point as follows (at [21]):

> "At the hearing stage, counsel cannot properly make or persist in an allegation which is unsupported by admissible evidence, since if there is not admissible evidence to support the allegation the court cannot be invited to find that it has been proved, and if the court cannot be invited to find that the allegation has been proved the allegation should not be made or should be withdrawn. **I would however agree with Wilson J that at the preparatory stage the requirement is not that counsel should necessarily have before him evidence in admissible form** but that he should have material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it. **I could not think, for example, that it would be professionally improper for counsel to plead allegations, however serious, based on the documented conclusions of a DTI inspector or a public inquiry, even though counsel had no access to the documents referred to and the findings in question were inadmissible hearsay.** On this point I would accept the judgment of Wilson J."

50. Since judicial or other external findings are relevant for the purpose of demonstrating the existence of a prima facie case of fraud when the propriety of a pleading is challenged, it must follow that they are admissible evidence of a prima facie case of fraud at that stage.

51. The same approach has been taken to the question of whether other judicial decisions can be used to demonstrate the existence of a serious issue to be tried for the purpose of establishing jurisdiction. Two decisions, one of the Court of Appeal and one of the High Court, confirm that such evidence can be used in that way.

52. In **Joint Stock Co Aeroflot – Russian Airlines v Berezovsky and others** [2013] EWCA Civ 784 [2013] 2 Lloyd's Rep. 242, the Court of Appeal considered (among other issues) whether there was a serious issue to be tried against a BVI-domiciled entity (referred to as 'Finance' in the judgment) in allegations of fraud brought by Aeroflot against two individuals, Mr Berezovsky and Mr Glushkov, and a group of companies ('**Forus**') allegedly controlled by them.

53. As summarised at [23]-[24] of the Court of Appeal's judgment, Aeroflot relied on findings of a Swiss criminal court that Mr Glushkov had abused his position in Aeroflot so as to profit from transactions between Aeroflot and another group of companies, with a similar structure and the same ultimate beneficial owners, known as the Andava group. The Swiss criminal court also made findings about the interaction between the Forus and Andava groups, on which Aeroflot relied. Aeroflot relied on the findings as 'similar fact' or 'bad character' evidence to support the similar allegations of fraud made in connection with the relationship between Forus and Aeroflot.

54. In concluding that there was a serious issue to be tried in the claim against Finance, Aikens L.J. said at [115]:

> "For the purposes of demonstrating that there is a 'serious issue to be tried', Aeroflot can properly rely on the Swiss criminal court finding that, in the 'Andava fraud' affair, Finance was involved in the movement of funds whose origin was Aeroflot."

55. The same approach was adopted by Carr J. in **Sabbagh v Khoury** [2014] EWHC 3233 (Comm),[6] in which the claimant sought to bring a claim alleging that she was deprived of shares in a company. One defendant was domiciled in England and others were domiciled abroad. The Defendants contended that there was no sustainable claim against the anchor defendant and no basis for bringing proceedings against the other defendants in England.

56. Carr J. concluded at [206] that:

> "I am inclined to agree with Sana that the findings of another court may be relied on at an interlocutory stage for the limited purpose of demonstrating whether there is a serious issue to be tried, for example in considering what material at trial there might be. The Court of Appeal in Joint Stock Co Aeroflot – Russian Airlines v Berezovsky (supra) clearly thought it appropriate to do so, and would have been well aware of the relevant principle in *Hollington v Hewthorn*. To deploy the findings of another court in this way does not endanger a fair trial for any of the parties. The situation in Calyon v Michailidis and others (supra) is distinguishable: there the findings of the Greek court were being relied on as conclusive, alternatively probative, evidence of a central plank of the claimants' case, without more."

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[6] Reversed on other issues [2017] EWCA Civ 1120

57. Carr J.'s citation of **Calyon v Michailidis** [2009] UKPC 34, which was relied on before her in seeking to oppose reference to the material, is a helpful demonstration of the limits of the proper reliance on other judicial findings. In that case, the claimants applied for summary judgment in reliance on the findings of the foreign court's conclusions in third-party proceedings. Although an interim application, the summary judgment application would have led to a determination of merits of the dispute.[7]

58. As the authorities above show, the law is straightforward: while the judgment and conclusions of other judges are not admissible to prove the truth of those conclusions (whether at trial or for the purpose of summary judgment), they <u>are</u> admissible as evidence in support of the contention that there is a genuine issue of fraud that the Court should consider carefully. That is the basis on which the 'Hollington Material' is relied on in Elliss 1, and the attempt to have that material struck out is therefore misconceived in law. As the decision in **Aeroflot** makes clear, that is equally true both of findings which go directly to matters in issue in these proceedings, and of findings which are 'similar fact' evidence of Dr Wright's propensity to lie and fabricate documents.

E2. Judgments as Evidence of Facts Referred To

59. There is a further basis on which TTL's application is inappropriate. The redactions proposed to Elliss 1 include not only the judges' conclusions, but also extends to the entirety of their judgments in the exhibit which set out underlying factual matters.

60. These judgments are admissible evidence, even at trial, as to the factual matters recorded in them. There is a wealth of authority demonstrating that the rule in **Hollington v Hewthorn** applies only to a court's conclusions, and does not prevent reference to the judgment for factual matters stated therein: see, for example, **Rogers v Hoyle** [2015] Q.B. 265, citing **Three Rivers DC v Bank of England** [2003] 2 AC 1.[8]

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[7] See also **Three Rivers DC v Bank of England** [2003] 2 AC 1, where the Court of Appeal was criticised for relying on the Bingham Report into the supervision of BCCI when deciding to strike out a claim on the ground that it had no prospect of success.

[8] In which the Court of Appeal upheld a decision to admit in evidence a report produced by the Air Accident Investigation Branch ('**the AAIB**'). Much of the argument before the Court of Appeal concerned whether the AAIB report contained admissible expert evidence, but Christopher Clarke LJ concluded at [57] "The report is admissible for its record of factual evidence (of whatever degree of hearsay) and its expert opinion." As Christopher Clarke L.J. noted in his judgment, the admission of reports or judgments for their record of factual evidence is not new, but had been emphasised by the House of Lords in **Three Rivers DC v Bank of England** [2003] 2 AC 1, see e.g. per Lord Hope of Craighead at [31]-[32] and [79].

61. The evidence contained in the exhibit to Elliss 1 which C seeks to have struck out contains both judges' conclusions and their recitals of factual evidence. To take just one example, the judgment of Judge Reinhard in the Kleiman Claim (discussed in Elliss 1 at paragraphs 60-64 **{B/2/33-35}**) contains a number of factual statements about Dr Wright's previous explanations which will be admissible as evidence of previous inconsistent statements. The judgment is admissible as evidence of the fact that those statements were made, even though the judge's conclusion that Dr Wright was being deliberately dishonest will not be something on which the Court could rely at trial.

62. As Elliss 1 explains and as is clear from the judgment at [TWE1/78-82] **{B/3/129-133}**, Dr Wright made a number of assertions in those proceedings in relation to an application to compel him to disclose details of his Bitcoin holdings. He asserted that the Tulip Trust had been constituted in October 2012 and held all of his Bitcoin holdings. He asserted in one filing that the Tulip Trust was a blind trust, and in another, that he was a trustee of it. He asserted both that the trust owned the Bitcoin, and later that it held only the private keys to his Bitcoin (the latter statement being inconsistent with the claim in these proceedings which asserts that TTL owns the relevant Bitcoin in the Addresses). Finally, as Elliss 1 notes at paragraph 64 **{B/2/35}**, Dr Wright did disclose a list of addresses at which he claimed to hold Bitcoin. The Addresses which this claim concerns are not included in that list.

63. None of the facts in the paragraph above reflects the finding of any other judge; rather, they are matters of fact which this Court will be entitled to refer to in considering the issues of Ownership and fraud.

64. When properly analysed, C's application would therefore require the Court to engage in a detailed exercise of striking out certain passages of the evidence and its exhibit as being inadmissible conclusions, and retaining other passages as admissible recitals of fact. The Court of Appeal has repeatedly criticised such a process: see the dictum of Thomas L.J. (as he then was) quoted at paragraph 6 above, cited with approval by Christopher Clarke L.J. in **Rogers v Hoyle** at [117] to [118].

E3. Conclusion

65. As regards the Hollington Material, C's application is therefore entirely misconceived. The evidence of other judicial decisions is admissible to establish to establish that there

is a cogent and credible case that a fraud is being attempted, and the Enyo Defendants are entitled to ask the Court to consider that in the exercise of its discretion as to how this case should be managed. In any event, parts of the judgments which C seeks to have excised from the evidence are admissible not only for the purpose of the application but would also be admissible as hearsay evidence at trial.

F. ELLISS 4 – VERY RECENT DEVELOPMENTS

66. The Enyo Defendants have made an application dated 1 October 2023 in light of developments which have taken place since late on Friday 29 September 2023 and over the weekend. The Enyo Defendants apologise for the short notice for this application but as the Court will appreciate, the very recent nature of the developments means it would have been impossible for the application to be filed earlier.

67. The developments are set out in Elliss 4 and relevant documents are exhibited thereto. In short, an associate (or former associate) of Dr Wright has announced his departure from nChain, a company closely connected with Dr Wright and in which Dr Wright was also recently employed. The associate, Mr Ager-Hanssen, has made a number of statements on X (formerly known as Twitter), both in Tweets and during the course of live video feeds on a part of the platform called 'Spaces', which support the Enyo Defendants' case that Dr Wright has consistently fabricated documentation for use in these (and other related) proceedings.

68. This is clearly important evidence which further corroborates the Enyo Defendants' case that there is a very serious issue to be addressed as to whether these proceedings are being advanced fraudulently and/or in reliance on deliberately fabricated evidence. As this evidence has been served after the deadline specified in the Court's order of 15 August 2023 **{A/1/4}**, the Enyo Defendants have formally applied for permission to rely on it.

69. It is submitted that the evidence is clearly highly relevant to the application if, as the Enyo Defendants will argue at the hearing, the prima facie evidence of fraud is a relevant factor in the Court's decision on whether to order a preliminary issue. The Court is therefore invited to grant permission to rely on the evidence at this hearing, so that TTL can, if so advised, serve any responsive evidence at the same time as it serves any other evidence on the merits of the case advanced by the Enyo Defendants.

70. The evidence in Elliss 4 also contains a second important point, which is the evidence that the individual who has (directly or indirectly) funded TTL's litigation, Mr Ayre, has indicated that he will no longer be providing Dr Wright with funding to allow him to contest this litigation.

71. As Elliss 4 notes at paragraphs 31 to 32, this significantly increases the exposure of the Enyo Defendants to incurring costs which will be irrecoverable if the security for costs application is not resolved until the CMC in mid-November. Given the significant amount of work which will need to be done to prepare for the CMC, the sum involved will be considerable, and there is now a significant risk that TTL will not pursue this litigation beyond the CMC, pay any security for costs ordered at the CMC, or meet an order for the Enyo Defendants' costs made at or after the CMC. TTL has already agreed to give security for costs up to and including disclosure, with the only remaining issue between the parties being the sum to be paid as security.

72. By their application of 1 October 2023, the Enyo Defendants seek an order from the Court in light of this significantly increased risk. There are three options identified in Elliss 4:

    72.1 The most efficient course would be for the Court to direct now that TTL give security for costs up to the CMC in a specified sum. This would address the new risks faced by the Enyo Defendants without any disruption to the existing procedural timetable. Whatever the Court's ultimate decision on quantum of longer-term security is when that issue is determined at the CMC, that sum will be significantly larger than the sum required to secure the Enyo Defendants' position during the CMC preparation phase.[9]

    72.2 Alternatively, the Court could make an interim order for security for costs up to the CMC, with both parties being at liberty to argue at the CMC that the amount of the security for costs be varied (in either direction) when the main application for security for costs is determined.

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[9] The Enyo Defendants are conscious that the court is generally reluctant to make mandatory orders on *ex parte* applications: see e.g. **Various Airfinance Leasing Companies v Saudi Arabian Airlines Corp** [2020] EWHC 3787 (Comm) at [43]. It may be said that there is a relevant analogy to be drawn with an order for payment of security sought urgently and on short notice. However, in the circumstances – and particularly given that TTL has already agreed to give security – it is submitted that this is the most appropriate course and there will be no unfairness to TTL.

72.3 Finally, the Court could set directions for the separate determination of the security for costs application on an urgent basis. This would require additional hearing time to be found in the near future, but given that the main issue between the parties is only as to the quantum of security, it would not need to be a long hearing.

G. CONCLUSION

73. For the reasons set out above, the Court is invited to dismiss TTL's application and order that TTL pay the Enyo Defendants' costs of the application.

74. The Court is also invited to make an order in respect of the security for costs application and to direct that TTL files any further evidence in response to the Preliminary Issue Application (including the additional evidence in Elliss 3 and 4) within 14 days. That is the timeframe proposed in TTL's own application (see Lee 1 ¶38 **{E/2/994}**) and will allow sufficient time for any further evidence in reply to be served well in advance of the CMC.

SEBASTIAN ISAAC K.C.

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3 October 2023

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