Claim No. BL-2021-000313

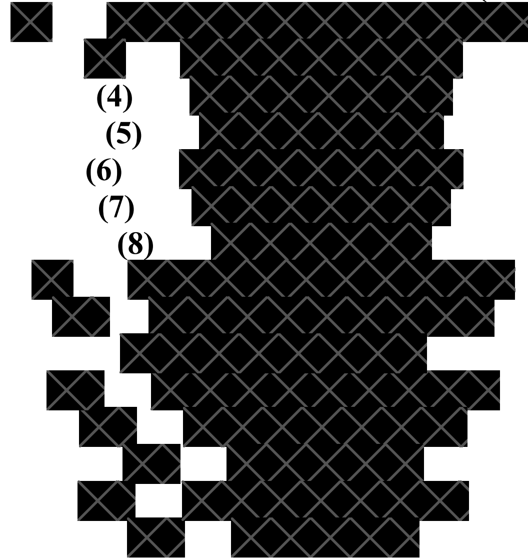
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
B E T W E E N:

(1) TULIP TRADING LIMITED (a Seychelles company)

Claimant

- and -

(1) BITCOIN ASSOCIATION FOR BSV (a Swiss verein)



Defendants

SKELETON ARGUMENT OF D2-D14
FOR CMC
to be heard in a window starting 13 November 2023

References in this skeleton argument are in the form **{section/tab/page}**. Sections A-F comprise volume 1 of the electronic bundle; section G (exhibits to the evidence) is in volume 2.

Suggested pre-reading (in the following order): estimate 1 day

1. Skeletons
2. The main "ownership" sections of the pleadings, namely:
    a. Amended PoC¶13 {**A/2/21**} and ¶¶35-40 {**A/2/29**}
    b. Defence of D2-D12 ¶1 {**A/4/80**} and ¶¶54-66 {**A/4/104**}
    c. Reply to D2-D12¶¶92-117 {**A/6/176**}

3. The following witness statements (or parts of statements) focussed on ownership/fraud
    a. Wright1¶¶32-96 {**D/77/624**}
    b. Cain1¶¶101-108 {**D/78/689**} ¶¶129-203 {**D/78/699**}
    c. Wright2¶¶19-26 {**D/79/761**}
    d. Elliss1 (in full) {**D/82**}
    e. Wright5 (in full) {**D/94**}
    f. Ellis6 (in full) {**D/98**}
4. The RFIs {**D/63/558**} and {**D/71/591**}
5. DRD Section 1 {**C/42/445**}

A. Introduction

1. TTL is a Seychelles company which seems ultimately to be controlled by Dr Craig Wright. Dr Wright is an individual best known for claiming (falsely, on the case of D2-D12) to be "*Satoshi Nakamoto*", the inventor of Bitcoin.

2. D2-D12 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: Elliss1¶14 **{D/82/833}**.

3. The nature of the dispute which is the subject of this action is summarised at Elliss1¶¶15-27 **{D/82/833-836}**. In very bare summary:
    a) TTL claims that it was (and is) the owner of c. 111,000 Bitcoin held at two blockchain addresses (the "**Addresses**"), which are respectively referred to as "**1Feex**"[1] and "**12ib7**",[2] and for which neither it nor Dr Wright now has the private keys. The Bitcoin at those addresses are described as the "**Digital Assets**".

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[1] The Blockchain records that 1FeexV6bAHb8ybZjqQMjJrcCrHGW9sb6uF ("**1Feex**") received 79,956 BTC from 27 addresses on 1 March 2011. Dust has been received in 1Feex since with the consequence that it currently has a Bitcoin balance of 79,957.26462896: see https://www.blockchain.com/explorer/addresses/btc/1FeexV6bAHb8ybZjqQMjJrcCrHGW9sb6uF.

[2] The Blockchain records a number of (incoming and outgoing) transactions on 12ib7dApVFvg82TXKycWBNpN8kFyiAN1dr ("**12ib7**") between 13 May 2010 and 25 July 2010 at which point it held 31,000 BTC. Dust has been received in 1Feex since with the consequence that it currently has a Bitcoin balance of 31,000.07376309: see https://www.blockchain.com/explorer/addresses/btc/12ib7dApVFvg82TXKycWBNpN8kFyiAN1dr.

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

c) TTL pursues novel legal claims, that D2-D12 (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.

4. This dispute, therefore, is an attempt by TTL and its owner (or owners) to gain control of more than 111,000 bitcoin, which have a present value of around US$4 billion. There is a vastly valuable prize on offer.

5. 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, complex and demanding trial.

6. However, D2-D12's 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. This issue of fraud is squarely pleaded by D2-D12, including as follows:

a) Enyo Defendants' Defence¶1 **{A/4/80}**:

"*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.*"

b) Enyo Defendants' Defence¶30 **{A/4/94}**:

"*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."

c) D2-D12 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 **{A/4/104}**; and that Dr Wright has a long record of producing and relying on forgeries ¶54.9 **{A/4/105-107}**.

7. D2-D12 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 Elliss1¶97.6 **{D/82/859}** explains:

"*Dr Wright's open desire to use these proceedings to ruin the lives of D2-D12 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"*"

8. TTL denies that it has brought a fraudulent claim, and has contended that other findings against Dr Wright are wrong and/or irrelevant. However, over the course of the past month, TTL has abandoned key aspects of its case on ownership of the Digital Assets and changed it case to such a degree that it bears little resemblance to either (a) its pleaded case or (b) the basis upon which permission to serve out was obtained. D2-D12 invite the Court to read Elliss6¶8-37 **{D/98/1031-1042}**.

9. Moreover, TTL has failed to engage with these proceedings properly in the run up to this CMC. D2-D12 recognise that the recent change in TTL's representation will have caused practical difficulties, but D2-D12's solicitors offered to take on a variety of the roles so as to alleviate that pressure (including initial drafts of the case summary, lists of issues, bundle index and preparing the bundles, all of which would usually fall to a claimant). Despite that assistance, TTL has only engaged with the present proceedings fitfully and has adopted wildly variant positions. The

submissions below respond to the position adopted by TTL in a letter sent at 10pm the night before this skeleton was due for service.

10. The following main issues will fall for discussion at the CMC:

a) The scope of the Preliminary Issue Trial (and costs of the PI application);

b) Whether TTL should be ordered to provide Further Information;

c) Whether D2-D12 should be granted permission to amend;

d) Whether any directions should be made for the Preliminary Issue Trial;

e) What disclosure should be ordered;

f) What further directions should be given;

g) What further security should be ordered.

B. Preliminary Issue Trial

11. On 11 July 2023 D2-D12 sought directions for a preliminary issue. D2-D12 initially proposed a single preliminary issue addressing the ownership of the Digital Assets, but did so on the basis that this would necessarily require the Court to consider the pleaded allegations of fraud, forgery and abuse of process. TTL refused to agree to the preliminary issue and criticised the assumption that it would address the allegations of fraud. Accordingly on 11 August 2023, D2-D12 circulated a revised draft order specifically enumerating those connected issues.[3] A formal application to amend D2-D12's PI Application was later issued as well.[4]

12. At all points until 31 October 2023, TTL bitterly resisted the application for the trial of a preliminary issue. However on that date TTL confirmed that it would no longer oppose that approach.[5] Although TTL's change of position is welcome, it is remarkable that TTL should have spent months contesting a preliminary issue trial, not only in a number of witness statements (Lee1 {**D/85/880**}, Lee4 {**D/88/911**} and Wright5 {**D/94/981**}) but also through its unsuccessful application to strike out aspects of the evidence relied on by D2-D12 in support of their application. If TTL

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3 Letter from Enyo Law dated 11 August 2023 {**F/144/1229**} and draft order {**F/144/1230-1235**}.

4 D2-D12 Application Notice dated 27 September 2023 {**D/65/563-568**} and draft order {**D/66/569-570**}

5 Letter from Shoosmiths dated 31 October 2023 {**F/222/1392-1395**}.

had accepted the obvious sense of determining ownership issues first, then none of those costs would have been wasted.

13. As matters stand at the date of this skeleton, there are two remaining issues on the PI Applications (in addition to the question of what directions to a PI Trial should be given, which technically forms part of D2-D12's PI Application but is dealt with in the section on directions below). Those matters are:

    a) What should the issues for the PI Trial be?

    b) What order for costs of the PI Applications should be made?

1. Definition of the Issues

14. At present, there are three slightly different formulations of the Preliminary Issues before the Court. In summary:

    a) D2-D12 proposed that there be a preliminary issue trial on the questions of:

        i) whether TTL owns the Bitcoin in the Addresses; and

        ii) whether the claim has been brought by TTL knowing that it does not own the Bitcoin in the Addresses, and whether the claim is advanced fraudulently by TTL such that it is an abuse of process.[6]

    b) TTL appears to accept the first of those issues (although it rewords it in a manner that does not immediately seem to be significant), but also proposes the inclusion of a further issue as to whether the alleged 'Hack' took place.[7]

    c) D15 and D16 have proposed that the issue of ownership be determined, but that the Court should also determine the issue of whether the necessary parties are before the Court and what effect that has on the determination of ownership.[8]

a. Fraudulent claim/abuse of process

6 {**F/144/1230-1235**}.
7 See paragraph 4 of letter from Shoosmiths of 31 October 2023{**F/222/1393-1394**}.
8 {**C/47/471**}

15. The key area of difference between TTL and the Defendants concerns the question of whether the Court should address whether the claim is advanced fraudulently and is an abuse of process.

16. It is important, and procedurally appropriate, that the issue of fraud and abuse of process <u>is</u> dealt with at the first opportunity, i.e. at the Preliminary Issue Trial. The reasons for that are as follows:

    a) It is well-established (and D2-D12 do not understand it to be in dispute) that deliberately to make a false claim and to adduce false evidence is an abuse of process: see *e.g.* **Fairclough v Summers** [2012] 1 WLR 2004 at [41].

    b) It is also clear that production and reliance on forged documents is an abuse of process: see *e.g.* **Arrow Nominees v Blackledge** [2000] 2 BCLC 167. Reliance on forged documents (and the making of deliberately false claims) is self-evidently an abuse of process where the determination that the documents are a forgery (or that the claim is knowingly false) would also lead to the determination of the substantive issues against the liar or forger.

    c) 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 v Zahoor** [2010] 1 WLR 746 at [74], **Fairclough** at [39]. 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.

17. TTL's fraud and abuse (including its reliance on forged documents) is bound up with its case on ownership of the Digital Assets. The fraud, forgery and abuse of process issues are not an adjunct to the core issue of ownership, but rather a key issue which the Court ought to determine.

18. That can be seen most vividly from the evidence of forgery of the two sets of supposedly contemporaneous records that were relied upon by TTL as evidence of ownership to support its claim to serve proceedings out of the jurisdiction, namely

the purported purchase order[9] and MYOB records in relation to 1Feex.[10] The evidence of forgery of the first document is overwhelming.[11] The forgery of the latter records only emerged through disclosure in the COPA proceedings.[12]

19. Given the complete overlap between the issues of ownership and fraud, the matters should be tried together at the Preliminary Issue Trial – and D2-D12 invite the Court to make an Order for those preliminary issues in the terms proposed by D2-D12.

b. The alleged hack

20. D2-D12 have no objection to the inclusion at the Preliminary Issue Trial of the issue of whether the alleged Hack took place. The formulation of that issue should follow the List of Issues for Trial, namely: "*Did unknown persons unlawfully access Dr Wright's computer and network between 5 and 8 February 2020 and wipe the TTL Private Keys and Keys Access Material, i.e., did the Alleged Hack occur?*". There are outstanding issues between the parties as to the impact this will have on procedural matters such as expert evidence, but in principle D2-D12 do not oppose the inclusion of that issue.

c. D15-D16's proposed preliminary issue

21. D2-D12 have not applied for the additional preliminary issue proposed by D15 and D16, and accordingly do not make any submissions on that aspect of their co-defendants' application.

2. Costs

22. TTL spent months opposing the PI Application, only to abandon that position shortly before this hearing. The late change in position has resulted in a significant wasting of costs. The grounds upon which TTL has belatedly agreed to the

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9 See {**G/2/328**}. It was relied on at Wright1¶39 {**D/77/626**}, Cain1¶104 {**D/78/690**}, Cain3¶51.4 {**D/80/803-804**} and Wright2¶24-26 {**D/79/763-764**}.

10 This was relied on at Cain1¶106.1 {**D/78/691**}, and Wright2¶26{**D/79/764**}.

11 See Elliss1¶40-41 {**D/82/841-844**}.

12 See Elliss3¶9-24 {**D/92/965-968**}.

Preliminary Issue[13] are all reasons why TTL should have agreed to the preliminary issue in the first place. TTL should accordingly pay the costs of the application on the indemnity basis.

C. Part 18 Applications for Further Information

23. There are two applications for further information pursuant to CPR Part 18 which have been made by D2-D12:

   a) An application dated 23 August 2023 ('the August Application') {**D/62/552}-{D/64/561}.**

   b) An application dated 25 October 2023 ('the October Application') {**D/69/580**}.

24. As a preliminary point, TTL disputes whether the Court should hear the October Application at this CMC, on the basis that it was issued at the same time as a request was made of TTL directly. This position is misconceived:

   a) Firstly, the CPR expressly contemplates that in certain circumstances, an application under Part 18 will be made when a Request has not been made pursuant to paragraph 1 of PD18. In particular, PD18 para 5.3(1) provides that if a request has not been made, the application notice should explain why that is the case. The application notice dated 25 October 2023 explained that a request had not been made first because D2-D12 were awaiting receipt of Wright 5, which was received on 18 October 2023. The request and application, which are made of both TTL's Reply and of Wright 5, were made shortly thereafter.

   b) Secondly, TTL has had more than two weeks' notice of this application (even assuming that the CMC takes place on the first day of the window). That is well in excess of the necessary notice for the application to be heard at the CMC. There was ample time for TTL to confirm its position on whether it would respond to the request and, if it contested the entitlement to further information, to file evidence in response to the application.

[13] See paragraph 3 of TTL's letter of 31 October 2023 {**F/222/1393**}.

c) Finally, there is no purpose in convening a separate hearing very shortly after the CMC to deal with a request for further information.

1. The August Application

25. On 5 April 2023, D14 served a Part 18 request concerning TTL's Amended Particulars of Claim dealing with various requests, including certain requests as to ownership.[14] On 31 July 2023, TTL replied to the response, but denied that D14 was entitled to further information on the requests concerning TTL's ownership of the Digital Assets.[15]

26. Contrary to that response, further information of the APOC is necessary and accordingly D2-D12 made a further request of the Claimant in the same terms as the ownership requests which TTL had refused to answer.[16] By a letter dated 14 August 2023, TTL confirmed that it would not respond to the repeated requests.[17] D2-D12 therefore made the application dated 23 August 2023 seeking an order requiring TTL to respond.[18]

27. The four requests relevant to the August Application essentially concern two issues:
    a) What is TTL's case about how it came to own the Digital Assets?
    b) What is TTL's case about how the Addresses (in which those Digital Assets were held) were created and who has controlled them at material times?

28. TTL's case on how it acquired ownership of the Digital Assets is opaque, if not simply incoherent. APOC¶3 {**A/2/19**} pleads that TTL 'is the owner' of those assets, and APOC¶¶29-31 {**A/2/27-28**} are in a similar vein: all of them simply assert that TTL owns the assets (i.e. owns them now) and that they 'were purchased' or transactions 'were undertaken'. No particulars are given on how TTL is said to have acquired title to the Digital Assets.

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14 {**D/62/554**}
15 {**A/9/262-269**}.
16 {**F/143/1227**}
17 {**F/150/1243-1244**}.
18 {**D/62/552-557**}; RFI {**D/63/558-560**}; draft Order {**D/62/561-562**}.

29. Some further explanation was given in the witness statements supporting the application for permission to serve out. Taking the example of the Digital Assets in the 1Feex Address only (because no compelling account of the acquisition of 12ib7 was provided at all in Wright1 or Cain1):

a) Wright1¶39 {**D/77/626**} states that the Digital Assets in the 1Feex address were originally purchased in February 2011, and Wright1¶42 said (somewhat elliptically) that that Bitcoin 'now belongs to TTL' {**D/77/627**}.

b) Cain1¶104 {**D/77/690**} said that the purchase of the '1Feex Bitcoin' was recorded in a contemporaneous document, being the 'Purchase Order' referred to above. Mr Cain recorded Dr Wright's account that the Purchase Order may have been uploaded or emailed to the exchange from which the 1Feex Bitcoin were allegedly acquired, but that it also might not have been used to process the transaction. Cain1¶176 {**D/77/713**} asserted that expert analysis[19] indicated that the Purchase Order was contemporaneous, and that this was '*a good piece of evidence in support of TTL's ownership*'.

c) The purchase order does not refer to TTL but instead gives the identity of the purchaser as "*Craig Wright R&D Trust*". {**G/2/328**}

d) Wright1 also referred to points made in Cain1 by way of full and frank disclosure, suggesting that although Cain1 had disclosed possible inconsistencies in accounting records, Dr Wright saw no inconsistencies. Wright1¶76 {**D/77/667**} said:

"However, I see no inconsistency in the accounting records - the Craig Wright R&D Trust became the Tulip Trust and both TTL and Wright International Investments Ltd are companies whose shares are held within the Tulip Trust. The Bitcoin in the Addresses is now held by TTL as I have described above"

30. Wright5 has now disclaimed many of the above points, and added a further stage to the explanation of TTL's alleged title to the Digital Assets. In particular:

a) Wright5 says that Mr Cain was mistaken to describe the Purchase Order as a contemporaneous document, and that '*neither TTL nor I do not and have not attempted to suggest otherwise*'. That is obviously wrong given that Dr Wright made precisely such a claim in Wright1¶39 {**D/77/626**} and Wright2¶24 {**D/79/763**}.

[19] He exhibited a report by Alix Partners in this respect at {**G/2/329-339**}.

b) Wright5¶30 {**D/94/990**}says that he '*organised the purchase of the 1Feex assets in February 2011 through Wright International Investments Ltd, with the intention of these moving to TTL as set out at paragraph 12*'.

c) Wright5¶12.3 {**D/94/983**}asserts that:

"*The Digital Assets were acquired through Wright International Investments Ltd, with the intention of initiating the company that eventually became known as Tulip Trading Ltd. Under the Australian Corporations Act all aspects preceding a company's creation are legally transferred to the company itself, and this legal principle also applies in the context of the Seychelles, provided that all relevant processes continue to take place.*"

d) However, Wright5¶12.5 {**D/94/984**} asserts that '*TTL has continuously held and owned the Digital Assets since 2011*'. At Wright5¶17.1 {**D/94/986**} Dr Wright says '*I acquired the 1Feex assets as early as 2011*', and in Wright5¶47 {**D/94/995**} he concedes that Mr Elliss was right to note that the paper wallet relied on by Dr Wright '*confirms that TTL did not own the Digital Assets until October 2014*'.

e) Mr Wright had previously advanced no coherent explanation of the acquisition of the bitcoin in 12ib7. He has made a late effort to describe how those bitcoin were possibly acquired at Wright5¶36-37 {**D/94/992**}, but as Elliss6¶32-37 {**D/98/1039-1042**} explains, that evidence is itself incoherent.

31. The result of the above is that TTL has advanced a wholly unparticularised case in Wright5, by which it contends that the Digital Assets in 1Feex were acquired by Wright International Investments, but that by some unidentified provision of the Australian Corporations Act, which principle is also somehow said to apply in Seychelles, the assets have been legally transferred to TTL. However, in addition to that unparticularised case, Wright 5 also says that TTL has owned the assets since 2011.

32. In its response to D14's Part 18 Request, TTL asserted that:

"*TTL's ownership of the Bitcoin in the Addresses is pleaded sufficiently to enable Mr Ver to prepare his own case and to understand the case against him, and it is not reasonably necessary or proportionate for TTL to be required to elaborate on its pleading.*"

33. In light of the matters set out above, that is unsustainable. It is essential, in order for the Defendants to know the case they are required to meet as to ownership at the PI Trial, that TTL should set out how it came to acquire the Digital Assets and the Addresses, from whom, and when, and by what means the transfer took place.

2. October Application

34. The first request in the October Application concerns a paper wallet that was disclosed by Dr Wright in relation to the 1Feex address. The Court will recall that D2-D12 have pleaded that the document is a forgery.[20] Paragraph 107 of TTL's Reply to that Defence {**A/6/179**} simply pleads that the allegations are irrelevant. However, Wright5¶48 {**D/94/995-996**} appears to rely on the paper wallet as evidence of ownership.

35. Whether the paper wallet appearing to contain keys to the Digital Assets in the 1Feex Address is genuine is directly relevant to the claim and the defence. At the most basic level, if the document is genuine, because TTL still has access to the paper wallet that it disclosed in the Florida proceedings, then it can access the Bitcoin in the 1Feex Address. That would be fatal to TTL's claim against the Defendants in respect of that Address, because the claim is premised on TTL having lost access to the Digital Assets.

36. Request 1 therefore seeks confirmation of whether TTL contends that the document is genuine or not. D2-D12 ask three other straightforward questions about the paper wallet on each alternative basis (i.e. that it is said to be genuine or that it is not said to be genuine).

37. The second request is equally straightforward. TTL claims to have held not only the Relevant Private Keys, but also what it refers to as 'Keys Access Material', and contends that both of these categories of data were lost as a result of the Hack.

[20] Defence¶54.9.4 {**A/6/106**}.

38. One of the odd features of TTL's case is that although the Hack is alleged to have taken place on or around 5 February 2020, the alleged hackers have not dealt with the Bitcoin, which has remained in the Addresses without any material change since 2011. In paragraph 113.2 of its Reply to D2-D12's Defence {**A/6/179**}, TTL posits three alternative explanations for why this is the case. Two of the explanations rely on additional levels of protection of the material.

39. In that context, D2-D12's second request asks, in summary, what the information relating to the private keys was, where it was stored, and how it was protected. Proper particulars of the alleged 'Keys Access Material' are essential to understanding TTL's case as to ownership of that material, and particulars of how it was stored and protected are clearly of very significant relevance to the Court's consideration of evidence as to the alleged Hack.

3. Conclusion

40. The Court is invited to order that TTL provides the further information sought by both applications.

41. By its solicitors' letter of 3 November 2023 {**F/230/1409-1410**}, TTL has proposed that it should provide any response to the October Application within 28 days of the CMC. D2-D12 have confirmed that they are happy to agree that timescale for a response, but that any dispute as to the entitlement to a response be determined at the CMC. The Court is therefore invited to order that TTL respond substantively to the requests within TTL's proposed timescale of 28 days.

D. Permission to amend

42. As noted above, there is persuasive evidence that the MYOB data upon which TTL has relied to support its claim of ownership of the bitcoin at 1Feex has been falsified by Dr Wright. That evidence only emerged after the application was made for a preliminary issue. It was explained in Elliss3 on 27 September 2023 {**D/92/963**}. D2-D12 have accordingly proposed a modest amendment to pick up this specific

evidence of falsification, and have served a draft Amended Defence on 9 November 2023.If this is opposed, D2-12 invite the Court to grant permission to amend.

E. Directions

43. As at the date of this skeleton argument, there is an issue between TTL and Ds as to whether the Court should give directions to the PI Trial at all, or whether it should simply approve the list of issues for disclosure and direct further directions questionnaires on the PI Trial. TTL invites the Court only to order a further CMC and not to make any further directions beyond that or to fix a trial date.

44. TTL's position is misplaced for four reasons:

a) Firstly, TTL has advanced no justification for the approach it proposes.

b) Secondly, in their PI Application, D2-D12 sought directions to the trial of a preliminary issue. That application for directions is before the Court at this CMC and TTL ought to have been ready to deal with it, especially given that it has already conceded (albeit belatedly) that a PI Trial is appropriate.

c) Thirdly, the Court will recall that after the PI Applications were issued, the parties had a 'directions battle' (as the Court described it in its judgment of 4 October 2023) about the listing of the various applications. Ds sought the listing of their applications for a PI Trial in advance of the CMC; TTL opposed that stance on the basis that the parties could readily prepare for either eventuality by exchanging two sets of draft directions.[21] The Court eventually ruled in favour of the approach proposed by TTL, with the result that the PI Applications fall to be determined at the CMC. In circumstances where the Court listed a three-day hearing on the basis of TTL's submission that the PI Applications and the CMC could be heard at the same time, and where there has been no material change in circumstances to justify any different approach, it is wrong in principle for TTL now to say that it is not actually workable for the parties to adopt the approach which it previously proposed.

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[21] TTL's position is set out in paragraphs 25 to 28 of its skeleton argument for the directions hearing. Relevant correspondence may be found at {**F/103/1128**}, {**F/111/1142**}, {**F/115/1155**}, {**F/116/1161**}, {**F/119/1167**}, {**F/133/1199**}.

d) Fourthly, delaying any further case management directions until after a further CMC is likely to delay matters very significantly. In particular:

  i) The parties are well aware that both the assigned judge and Dr Wright (along with certain of the Ds) are all engaged in the trial in the COPA Proceedings in early 2024. TTL's proposal for a CMC to take place from February 2024 onwards is, therefore, likely to be unrealistic. Even assuming that the Court and all counsel are available very shortly after the conclusion of the COPA trial, it is still likely that these proceedings will be delayed by at least 5 months.

  ii) As matters stand, it is understood that the Court is unlikely to hear the PI Trial until the autumn of 2024 or early 2025, even assuming that it is listed in the near future. If no direction for listing of a PI trial is given until the spring of 2024, it is likely that the trial will be significantly delayed.

e) Fifth, it is not fair to the Developers that the present claims should continue to hang over them for an indeterminate period.

45. Accordingly, D2-D12 submit that the Court should give directions to a PI Trial. Two days of Court time have now been allocated for this CMC and the parties' applications, and it is appropriate for that time to be used in making directions.

46. In the alternative, should the Court not feel able to give full directions to trial at this stage, it is submitted that the Court should:

a) Order that the parties give Extended Disclosure in accordance with the List of Issues for Disclosure). Although TTL will need to serve a Section 2 of the DRD, there is no justification for delaying the entirety of the disclosure process until after a further CMC, in circumstances where the Court is able to approve the issues for disclosure and the models.

b) Direct that the PI Trial be listed.

E. Disclosure

1. Introduction

47. Five possible topics arise in relation to disclosure:

    a) The Court is invited to approve the list of issues for disclosure in relation to the PI trial.

    b) There is a possible question about who should file section 2 of the DRD.

    c) There is a question as to whether TTL should be required to provide a list of the documents upon which it relies in support of its ownership of the Digital Assets.

    d) There is an issue as to the timing of the production of disclosure.

    e) It is sensible for there to be a discussion as to the approach taken to claims of privilege.

2. List of Issues for Disclosure for the PI Trial

48. The Court is invited to approve the list of issues for disclosure in respect of the PI Trial in the form proposed by Ds. The disputed issues concern issues 2 to 4 of the List of Issues for Disclosure.

a. Correct approach to identifying issues

49. Paragraph 7.6 of PD57AD provides:

    "*The List of Issues for Disclosure should be as short and concise as possible. "Issues for Disclosure" means for the purposes of disclosure only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. It does not extend to every issue which is disputed in the statements of case by denial or non-admission.*"

50. In **McParland v Partners v Whitehead** [2020] EWHC 298 (Ch), Vos C. said that:

    "*Issues for Disclosure are issues to which undisclosed documentation in the hands of one or more of the parties is likely to be relevant and important for the fair resolution of the claim.* "

b. Issues 2/ to 4 in the draft List of Issues for Disclosure - fraud and forgery

51. The three[22] disputed issues on fraud and forgery issues on which Ds seek Extended Disclosure. They are numbered as (2) to (4) in the List of Issues for Disclosure and are in the following terms:

"*(2) Is TTL's claim advanced in the knowledge that it has no genuine claim to the assets it claims?*
(3) Has TTL and/or Dr Wright fabricated and/or forged evidence in these proceedings?
(4) Has Dr Wright previously fabricated evidence or given false evidence in legal proceedings or quasi-judicial proceedings, either as to his assets or his qualifications? [Is there a large number of online articles and other research indicating that Dr Wright has committed fraud and plagiarism?]"

52. Each of the above issues should be considered separately but they raise a number of similar issues.

53. Common to all three issues is a single theme: Ds' case that the claim is fraudulently advanced by TTL, which knows (on Ds' case) it has no genuine right to the Digital Assets. This is not a peripheral or minor issue. On the contrary, it is squarely pleaded in the very first paragraph of D2-D12's Defence, and repeatedly thereafter. It is also expressly alleged that TTL has advanced this claim in reliance on forged documentation: see for example paragraph 54 of the same Defence, which pleads expressly that the purchase order used to justify service out of the jurisdiction is a forgery.

54. It ought to go without saying that the allegations of deliberate fraud and forgery are allegations where the documentary evidence will largely be in the hands of TTL, and not Ds. While Ds are able to identify (and have identified) evidence from external sources which expose TTL's claim as being fraudulent, the key documentation as to TTL's knowledge and its fabrication of documents will be documentation only in TTL's control.

[22] TTL's letter of 8 November 2023 {**F/239/1433**} suggests that D2-D12 have already agreed to the removal of issue 2. That is not quite correct. D2-D12 have agreed that it can be omitted if TTL confirms that the same issues are included in issue 1, for the reasons set out in this skeleton argument. As at the date of this skeleton argument, that confirmation has not been given.

55. For the purpose of this skeleton argument it is sufficient to give one example where Ds already know, by coincidental disclosure in another matter, that Dr Wright and/or TTL have manipulated evidence. This evidence is addressed in the third statement of Mr Elliss ("Elliss 3") dated 27 September 2023 **{D/92/963}** and is referred to above. In particular:

a) The Court will recall that in seeking to establish TTL's ownership of the Digital Assets, TTL initially relied on two key pieces of 'evidence.' They were:

   i) the Purchase Order referred to above; and

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

b) 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)...*"

c) 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.

d) 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.

e) As Elliss3 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.

56. It is fair to say that Dr Wright disputes the conclusion that the records were fabricated. He appears to suggest that the MYOB records which were backdated in 2020 to appear as if they were made in 2011 were generated by his former solicitors, Ontier, without his involvement: see Wright5¶39 {**D/94/993**}. Determination of the true position will be a matter for trial. For present purposes, it is sufficient that the disclosure of native copies of documents was the only way in which D2-D12 were able to analyse the metadata and discover what they will say is a serious example of fraud on the court.

57. The documents in TTL's possession or control, particularly when disclosed in native format with their original metadata, are therefore important in resolving the issues of fraud and fabrication.

58. As to the specific disputed issues, D2-D12's submissions are as follows. To avoid repetition, it is convenient to consider issues 3 and 4 before turning to issue 2.

b. Issue 3 - Has TTL and/or Dr Wright fabricated and/or forged evidence in these proceedings?

59. TTL resists giving disclosure on the issue of whether it or Dr Wright has fabricated or forged evidence. It takes a variety of points, which can be conveniently broken down as follows (the numbering and formatting below has been added to TTL's objections in the List of Issues of Disclosure):

"*[1] The Defendant has not alleged that any evidence in these proceedings has been fabricated. Absent a specific plea identifying such evidence, this is not in issue in the proceedings.*
[2] Furthermore, this is a conclusion that the Defendants would seek to draw from the evidence rather than a focussed issue of fact that can be the subject of a document search.
[3] Moreover, the allegations of fraud are not a necessary part of the Defendants' defence and so should not be an issue for disclosure. What is being sought is disclosure going to issues of credibility, which is not appropriate.
[4] In any event, as formulated this issue is unworkable."

60. The first objection is factually incorrect. At paragraph 54.2 of their Defence, D2-D12 expressly plead that "*The purchase order submitted by Dr Wright in these*

proceedings purportedly as evidence of the alleged purchase of the Bitcoin at the 1Feex Address is a forgery." As noted above, D2-D12 have also served a draft Amended Defence which formally pleads the allegations made in Elliss3 about falsification of the MYOB Data relied on in Cain 1.

61. The second objection is also wrong. Whether TTL or Dr Wright has forged or fabricated evidence is plainly a focused issue of fact. The description of it as a '*conclusion… [to be drawn] from the evidence*' is not understood. In resolving disputed questions of fact made at trial the Court is necessarily drawing conclusions from the evidence. The MYOB Data discussed above are a neat example of this point. It is only disclosure (in this example, disclosure in other proceedings) which has revealed documentary evidence that allegedly contemporaneous accounting records were in fact inserted onto the system in March 2020, many years after the alleged events and only shortly before the documentation was to be provided to an expert witness.

62. There is no realistic objection to the practicalities of providing Extended Disclosure on this issue. The evidence which may have been fabricated or forged will likely be the evidence relied on by TTL or Dr Wright to date. Disclosure of those documents in native format, with their metadata and chain of custody records, will be the starting point for Model E disclosure. It is appropriate that Model E is used because in so far as TTL's solicitors identify discrepancies in the documentation, it is clearly appropriate that they should seek to identify whether there are disclosable documents which shed light on those discrepancies.

63. The third objection is that the issue of forgery is '*not a necessary part*' of the Defendants' defence. That is not a valid objection. It is a central part of D2-D12's Defence that this claim is fraudulent and is knowingly advanced on the basis of false and fabricated evidence. That is obviously relevant to the issue of whether TTL owns the Digital Assets, but it is also an important issue in its own right.

64. D2-D12 recognise that if, at the Preliminary Issue Trial, the Court finds the claim to be fraudulent and that TTL has forged evidence, it will also find that TTL does not

in fact own the Digital Assets. Documentary evidence of the forgery or other manipulation of evidence by TTL is accordingly likely to have an important impact on the fair resolution of D2-D12's allegations that this claim is a fraudulent one and that Dr Wright and/or TTL have been deliberately fabricating evidence.

65. As to the final objection, TTL has not indicated any basis for its assertion that the proposed issue is 'unworkable'. For the reasons set out above, D2-D12 do not accept that this is accurate. It is a narrow and focused issue on which Model E disclosure is appropriate.

c. Issue 4 - Has Dr Wright previously fabricated evidence or given false evidence in legal proceedings or quasi-judicial proceedings, either as to his assets or his qualifications?

66. The Court will recall that TTL applied to strike out sections of Elliss 1 on the basis of the rule in **Hollington v Hewthorn** [1943] K.B. 587. In dismissing that application, the Court noted (as it had in Mellor J.'s recent decision in **Wright v Coinbase Global Inc** [2023] EWHC 1893 (Ch)) the analysis of Christopher Clarke L.J. for the Court of Appeal in **Rogers v Hoyle** [2014] EWCA Civ 257 at [39] in the following terms:

'*As the judge rightly recognised the foundation on which the rule must now rest is that findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it ("the trial judge"), and not another.* ***The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him.*** *To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard.*' (emphasis added)

67. D2-D12 have always accepted that it will be necessary to prove the allegations made at paragraph 54.9 of their Defence, which contends in summary that Dr Wright has repeatedly fabricated evidence and given false oral evidence in court proceedings relating to similar or connected issues. The necessary corollary of that rule is that it

will be necessary, and D2-D12 must be afforded an opportunity to adduce evidence in support of those allegations. They similarly accept, as the Court noted during argument at the strike out application, that allegations such as this require proper case management to ensure that they are dealt with proportionately.

68. As a matter of logic, the issues of fraudulent evidence and fabricated documents are distinct. D2-D12's case is <u>both</u> that (i) Dr Wright is prone to telling ever more complicated lies to avoid accepting that his account is false, and (ii) Dr Wright and TTL are prone to fabricating documentary evidence in an attempt to corroborate those false accounts.

69. TTL's submission that these matters <u>merely</u> go to credibility is simply wrong. While they obviously have a very significant impact on Dr Wright's credibility, many of the facts alleged have a direct impact on central issues to the claim.

70. Issue 4 represents D2-D12's proposal as to how this is dealt with expeditiously, at least as regards disclosure. The Court will note that only Model C disclosure is sought. D2-D12 consider that they need a narrow selection of documentary evidence to make good their allegations.

71. For the purpose of this skeleton argument, it is sufficient to take one specific allegation as an example of why D2-D12 consider that Extended Disclosure is appropriate and how they propose it should work.

72. D2-D12 make certain allegations concerning proceedings, the Kleiman Proceedings, in the US District Court in Florida: see paragraphs 54.9.2 to 54.9.4 of their Defence. Although the Defence asserts the relevant facts which D2-D12 will prove, the relevance of these points is helpfully explained in further detail at Elliss1¶¶61-62 {**D/82/849**}in the following terms (omitting footnotes):

"*61. In the Kleiman Claim, Dr Wright disclosed emails that showed that he did not acquire TTL until 2014 (contrary to sworn declarations made by him in the course of the proceedings that he signed the Tulip Trust in October 2012). He also disclosed documentation that gave the outward impression that he had been the owner of TTL since 2011, but which, on analysis of the surrounding documentation, were*

demonstrably shown to be backdated. These documents indicated that TTL could not have owned the Digital Assets until at least October 2014.
62. Further, Dr Wright disclosed a paper wallet allegedly showing he was the owner of the Bitcoin in the 1Feex address. A paper wallet is a paper document that includes the public address and private key to a relevant address on the Bitcoin blockchain. The paper wallet disclosed by Dr Wright is also a forgery. It is a standard paper wallet generated on www.bitcoinpaperwallet.com which Dr Wright then altered. The QR code on the wallet is not genuine, the background is inconsistent with a genuine paper wallet, and was a background that was only introduced in 2014, some three years after the alleged purchase. It is notable that Dr Wright did not mention this paper wallet in his explanation of his purchase of the Digital Assets in this case. Even if the paper wallet was genuine, the existence of a paper wallet itself requires an explanation from Dr Wright as to why he could not simply use the paper wallet to recover the funds he allegedly lost, given the purpose of a paper wallet is to be a safe offline backup against hacks."

73. Although not pleaded by TTL, as noted above, Dr Wright has relied on the paper wallet in these proceedings to justify TTL's claim to ownership of the Digital Assets, in particular the 1Feex Address, in his response to the criticisms in Elliss1: see Wright5¶¶47 and 48 {**D/94/995-996}**. It is accepted in this paragraph that TTL did not own the assets until 2014, but it is said that the Digital Assets were initially brought by Wright International Investments in order to capitalise the future TTL. Dr Wright asserts that the Digital Assets were moved into a paper wallet in 2012, and that the existence of the wallet in 2013 is corroborated by dealing with the Australian tax office.

74. This account of the history of TTL's alleged ownership of the Digital Assets is not pleaded and hence the subject of the request for further information. It is also apparently both internally inconsistent and inconsistent with Dr Wright's evidence in these proceedings and the Kleiman Proceedings.

75. Such matters are not only relevant to the credibility of Dr Wright as a witness of fact and the reliability of documentary evidence which he provides: they go to the heart of TTL's alleged entitlement to bring this claim. It is apparent from the US Court's decision that there are documents available in Dr Wright's possession or control, held because of his connections with TTL, which are relevant to the questions not only of when TTL existed and (allegedly) acquired the Digital Assets, but also to the

question of what Dr Wright has said about them previously and what D2-D12 say is the varying and incoherent nature of his accounts.

d. Issue 2 - Is TTL's claim advanced in the knowledge that it has no genuine claim to the assets it claims?

76. This is a key factual issue which is directly relevant to D2-D12's Defence and their contention that the claim is a fraudulent abuse of process. It is opposed on two grounds: firstly that it is already caught by issue (1), and secondly that it is inappropriate as an issue for disclosure for the same reasons as issues (3) and (4), addressed above.

77. As to the latter objection, D2-D12 repeat the submissions made above as to the centrality of the allegation of fraud to their defence of the claims against them. During the hearing on 3 October 2023, TTL's counsel accepted that there was a serious issue to be tried on the allegation that TTL was advancing the claim fraudulently {**E/101/1084**}(internal page 11, lines 18-20). That contention is central to D2-D12's case (see for example paragraph 1 of their Defence) and evidence of deliberately fraudulent claims, if there is such evidence in TTL's possession or control, is plainly likely to be relevant to the just resolution of the proceedings.

78. TTL's other objection is the issue is already caught by issue (1) on TTL's ownership of the Digital Assets, which is agreed. TTL's position is unclear, in that it appears to be submitting that Extended Disclosure on this topic is both already agreed (as part of issue 1) and also submitting that it is inappropriate as an issue for disclosure.

79. D2-D12's primary position is that for the sake of clarity, it is helpful to identify this issue as a free-standing issue for disclosure. However, if it is accepted by TTL that it will search for and disclose documents relevant to whether TTL's claim is advanced in the knowledge that it has no genuine claim under issue 1, then the question becomes purely one of drafting style and accordingly D2-D12 will not press the need to include issue 2 separately.

2. Section 2 DRD.

80. By its order of 15 August 2023 ¶2 {**B/34/415**}, the Court dispensed with the requirement to file section 2 of the DRD, with such documents to be discussed further at this CMC.

81. It is agreed that for the PI Trial, Ds are not going to give any search-based extended disclosure. TTL, on the other hand, will be giving disclosure based on searches, including Model E searches.

82. PD57AD para 10.5 includes the following wording:

    Section 2 of the Disclosure Review Document should be completed only if any party is seeking an order for search-based Extended Disclosure (i.e. Models C, D and/or E).

83. Consistently with this provision, it is proposed that Ds do not prepare Section 2, but TTL should. This is a case where there are issues as to the authenticity of documents, their provenance, and where there have also been concerns about the sufficiency of disclosure given by TTL's related parties in other proceedings. It will clearly be important that, from the outset, all parties understand TTL's proposals as to the approach it will take to Extended Disclosure.

84. Since the Court does not need to approve section 2 of the DRD, there is no need to make provision at this stage for it to be considered by the Court, whether at a second CMC or otherwise. If necessary, section 2 can form the basis of an application for disclosure guidance.

3. Reliance documents

85. D2-D12 have proposed that TTL provide the Defendants with a list of documents upon which it relies in relation to the ownership issue.

86. In circumstances where TTL's case has drifted significantly from its pleaded claim – and in which its present evidence is contradictory – it is appropriate that TTL should

(at the time of producing its disclosure) identify the documents upon which it relies to establish its ownership of the Digital Assets.

87. That is likely to narrow the ambit of the expert issues addressed at paragraph 98 below, but as importantly it will enable the Defendants to understand the supposed documentary basis for the case that TTL now proposes to advance and so is consistent with TTL's obligations under paragraph 5 of Part 57AD. At the moment the only documents related to ownership that TTL has provided under that paragraph are the purchase order and the Alix Partners report on TTL's accounting records, but TTL seems now to disclaim reliance on those.

4. Timing of disclosure

88. D2-D12 have proposed that TTL provide extended disclosure by 16 February 2024. TTL has proposed a date of 19 April 2024. It is important that progress is made on disclosure as soon as practicable, so that any issues that arise out of it can be addressed in good time ahead of the remaining directions towards trial.

5. Legal Professional Privilege

89. D2-D12 consider that issues may arise during disclosure about the scope of legal professional privilege ('LPP') and whether it has been waived. D2-D12 seek no decision from the Court on potential disputes at this stage, as the Court would be considering the issue in the abstract. However, D2-D12 do seek a direction pursuant to PD57AD para 14.1 that TTL should be required to disclose a full list of documents for which inspection is not offered on the grounds of privilege.

90. TTL has taken a number of steps which render any claim to LPP significantly more complicated than in the usual case. In particular:

   a) Dr Wright has, on behalf of TTL, specifically relied on his account of a number of privileged communications. [REDACTED]. TTL's reliance on those instructions is a clear waiver of LPP.

b) There are also grounds to believe that the iniquity exception may apply so as to prevent any claim to privilege. For example, Elliss 4 exhibits a number of exchanges which have been published on Twitter and indicate that Mr Ayre, who is believed by Ds to be funding this claim, has communicated to Dr Wright an understanding that Dr Wright's claims in litigation are factually untrue. In particular, in his email of 23 September 2023, Mr Ayre stated that "*I have been operating under the assumption that you and Ramona have the keys and that you were simply pretending not to have them as part of some strategy that you have trapped yourself in.*"[23]

91. As noted above, D2-D12 do not seek any decision on LPP from the Court at this stage. However, it is clearly going to be insufficient simply to claim privilege over all communications with, for example, Ontier, in circumstances where he has relied on the content of discussions with and instructions allegedly given to the same individuals. The Court is therefore requested to direct that TTL should identify privileged documents individually, rather than as a class.

F. Other directions

92. D2-D12 have proposed directions to a PI Trial {**C/47/470-477**}. In an effort to narrow the issues between the parties, D2-D12's proposed directions incorporated various provisions from TTL's proposed directions to a full trial. There seem to be four matters that will fall for discussion at the CMC: the proposal for a CMC early next year, the date of witness statements, the need for expert evidence and the length of the trial.

[23] See {**G/17/2800**}. The quoted email has been confirmed by Mr Ayre as authentic: {**G/23/3563**}. It is understood that Mr Ayre is referring to keys to addresses which would only be available to Satoshi.

1. CMC

93. In its proposal that the Court should make no further directions, including listing the matter for trial, TTL has proposed that a CMC be held with a time estimate of 2 days on the first open date from 5 February 2024 by reference to the availability of Counsel.

94. Although for the reasons provided above, there is no good reason for the Court to be prevented from making any substantial directions to trial in this matter at the present CMC, D2-D12 can see the good sense in the parties reconvening relatively shortly after the COPA trial. That will also enable the Court to address ahead of the service of witness statements any substantial issues arising from TTL's document production.

2. Date of witness statements

95. In light of the likelihood (based on indications from Chancery listing) that the trial will be listed in or about March 2025, D2-D12 are content to agree to TTL's proposal for exchange of witness statements on Friday, 7 June 2024.

3. Expert evidence

96. In making its original proposal in relation to directions D2-D12 envisaged that expert evidence on forensic document analysis will be required on the allegations of forgery. By a letter dated 31 October 2023, TTL proposed additional expert evidence in the form of:

a) "*a blockchain analytics report in relation to our client's ownership and whereabouts of the Digital Assets*"; and

b) "*a forensic report in relation to whether or not Dr Wright's systems were hacked at the time and in the manner he alleges*".

97. It seems from TTL's deletion of provision for any expert evidence that it resists evidence being adduced as to forgery (though it is not clear why) and that it no longer pursues any further areas of expert evidence.

98. So far as forensic document analysis is concerned, it is clear this will be required on the pleaded issues related to ownership. D2-D12 have made proposals (for the identification of challenged documents) ahead of service of such evidence and has proposed that the Defendants serve their evidence first. There has been no response to those proposals by TTL.

4. Trial length

99. Given the addition of the issue of whether the Hack took place, and the need to be conservative with listing, D2-D12 propose that the trial be provisionally listed with a 15-day estimate. That seems to be agreed. The estimate can be reviewed at a second CMC, but it is unlikely to be increased in any material way.[24]

G. Security for Costs

100. D2-D12 have applied, by their application dated 11 July 2023, for the payment of security for costs up to and including the Preliminary Issue Trial. Although initially disputed, it is now common ground that TTL should pay security for costs, and TTL has offered to do so in four tranches {**F/239/1436**}.

101. The issues before the Court on D2-D12's application are, therefore:

a) The assessment of the appropriate quantum of security for costs in each tranche;

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[24] As noted above, TTL has not engaged with proposed directions for a PI Trial or with the correspondence on proposed expert evidence disciplines. A firm estimate is therefore difficult to give at this stage. However, D2-D12 expect that a timetable along the following lines would be approximately correct: pre-reading – 3 days; oral openings – 1 day; C's evidence of fact – 2-4 days; Ds' evidence of fact – 1 day; expert evidence - 1-2 days; break before closings - 2 days, oral closings – 1 day. This totals 13 to 14 days, and D2-D12 therefore propose a 15-day estimate at this stage.

b) Whether that assessment should take into account what D2-D12 say is the high probability that any costs order in their favour will be made on the indemnity basis; and

c) Whether the order for security for costs should be made on an 'unless' basis, and if so, what should the consequence of breach of the order be?

102. We address first the correct approach to the assessment of quantum and then the question of an unless order.

1. Quantum of Security for Costs

103. The essential principles for assessing the quantum of security for costs are well-known, and were summarised by Henshaw J. in *Pisante v Logothetis* [2020] EWHC 3332 (Comm); [2020] Costs L.R. 1815 in the following terms:

"(i) The appropriate quantum is a matter for the court's discretion, the overall question being what is just in all the circumstances of the case. In approaching the exercise, the court will not attempt to conduct an exercise similar to a detailed assessment, but will instead approach the evidence as to the amount of costs which will be incurred on a robust basis and applying a broad brush (see also Excalibur Ventures v Texas Keystone [2012] EWHC 975 (QB) § 15).
(ii) In some cases, the court may apply an overall percentage discount to a schedule of costs having regard to (a) the uncertainties of litigation, including the possibility of early settlement and (b) the fact that the costs estimate prepared for the application may well include some detailed items which the claimant could later successfully challenge on a detailed assessment between litigants. There is no hard and fast rule as to the percentage discount to apply. Each case has to be decided upon its own circumstances and it is not always appropriate to make any discount.
(iii) In deciding the amount of security to award, the court may take into account the 'balance of prejudice' as it is sometimes called: a comparison between the harm the applicant would suffer if too little security is given and the harm the claimant would suffer if the amount secured is too high. The balance usually favours the applicant: an under-secured applicant will be unable to recover the balance of the costs which is unsecured whereas, if the applicant is not subsequently awarded costs, or if too much security is given, the claimant may suffer only the cost of having to put up security, or the excess amount of security, as the case may be (see also Excalibur § 18).
…
(v)In determining the amount of security, the court must take into account the amount that the respondent is likely to be able to raise. The court should not normally make continuation of their claim dependent upon a condition which it is impossible for them to fulfil."

104. TTL has not suggested that an order for security for costs up to and including the PI Trial would stifle the claim by imposing a condition with which TTL cannot comply.

105. The major issue between the parties is whether the Court should conduct this exercise on the basis of a likely indemnity costs order, should D2-D12 succeed in defending the claim at the PI Trial.

106. Two recent authorities provide a review of the authorities and an indication of the basis on which security for costs should be considered: the decision of Master Clark on an earlier application in these proceedings **Tulip Trading Ltd v Bitcoin Association for BSV** [2022] EWHC 141 (Ch), and the decision of Deputy Master Glover in **Santina Ltd v Rare Art (London) Ltd T/A Koopman Rare Art** [2022] EWHC 3513 (Ch).

107. In her judgment in these proceedings, Master Clark considered various authorities discussing an assessment of security for costs on the indemnity basis. The Master refused to assess the quantum of security on the basis of an indemnity costs order in that application, because the basis on which she was asked to do so was primarily that the case was unmeritorious, weak and/or speculative: see paragraphs 11 and 12. The Master considered it inappropriate for her to attempt to assess the merit of the claims on that application: see paragraph 18.

108. The authorities discussed by Master Clark show that a different approach can and has been taken in cases where there are allegations of dishonesty. Master Clark cited the decision of Roth J. in **Phones 4U Ltd v EE Ltd** [2020] EWHC 1943 (Ch), in which Roth J. rejected the suggestion that there was a general approach of a realistic possibility of indemnity costs being sufficient to justify an order for security on that basis. Roth J. considered that two previous decisions making such an order had to be considered on their facts:

> *"In Danilina , the claims were heavily dependent on the claimant's evidence, and Teare J held that if the claims failed there was a real possibility, if not a probability, that this was because the court found that she was being dishonest. Ingenious was very different in that in those proceedings the core allegation against the defendants was that they made fraudulent*

misrepresentations about the tax schemes they were promoting. It was for that reason that Nugee J felt that, should the court reject those allegations at trial, that could lead to an award of indemnity costs."

109. A similar approach was taken by Deputy Master Glover in the recent decision in **Santina v Rare Art (London)**, which concerned allegations of deceit by the seller of two French silver-guilt soup tureens. The Deputy Master distinguished Master Clark's judgment at [68], on the basis that:

Here, there is an allegation of dishonesty and fraud. If that case does not succeed, it is likely that it will result in an award of costs on the indemnity basis. In my judgment, in this type of case it is right to make provision for that eventuality.

110. It is submitted that this application should be approached in the same way. As in *Danilina*, the probability is that if the Court rejects TTL's case on ownership, it will do so on the basis that the claim has been advanced dishonestly. It is unlikely, to say the least, that the Court will find that TTL has a genuine, but mistaken, belief that it bought Bitcoin which are now worth approximately US$4bn.

111. As noted by the Deputy Master in **Santina**, there is no hard and fast rule as to the percentage of estimated costs which a claimant should be ordered to pay as security, even in cases where an indemnity basis is adopted. There are authorities supporting a starting point ranging all the way from 75% to 90%: see for example **Danilina** at [17] (adopting a figure 75%) and *Santina* at [74] (adopting a figure of 80% but recognising that a starting point of 90% could confidently have been adopted on the facts of that case).

112. D2-D12 seek an assessment at the upper end of that range. The costs estimates exhibited to Elliss 1 {**D/82/862**} amount to £1.39m, and Elliss 1 suggests a figure of £1.25m for security for costs.

113. As at the date of this skeleton argument, TTL's proposals as to the amount of security for each tranche are awaited, and the extent of disagreement between the parties on the figures is therefore unknown. D2-D12 propose to address the Court orally on the precise sums to be ordered, should it be necessary to do so.

2. Unless Order

114. D2-D12's application for security for costs proposes that the order made should be an unless order: see {**D/53/515**}. D2-D12 maintain that position, but in light of recent events and the stage that these proceedings have now reached, propose that the sanction stated in the unless provision should not be a stay of proceedings, but rather the striking out of the claim. That is not an unusual order, and there are four essential reasons as to why it is now the appropriate order in these proceedings:

   a) Firstly, if (as D2-D12 submit should happen) the Court gives directions to the preliminary issue trial at this CMC, then a stay of proceedings if any tranche of security is not paid will only serve to create uncertainty and delay. TTL would effectively be able to pay late and continue its claim as and when it wished to, causing Ds further uncertainty. Once a trial date has been listed, any significant breach of the order would give rise to a real risk that the trial date is lost.

   b) Secondly, as an extension of the first point, any such delays would only serve to increase Ds' costs of defending the proceedings. It would be inconsistent with the overriding objective for TTL's failure to pay security to have the result of increasing Ds' costs exposure.

   c) Thirdly, TTL's recent failure to pay interim security for costs until an unless order application was made justifies making an order which gives a clear incentive for compliance with the Court's order.

   d) Fourthly, that was the Order that was made against the Claimants in the claim against the Developers in the BTC Core action.

ALEXANDER GUNNING KC
One Essex Court
PHILIP AHLQUIST
Fountain Court Chambers

9 November 2023[25]

[25] Redacted version dated 13 November 2023 following TTL's service of a redacted version of Wright5. This redacted version is provided without prejudice to the contention that D2-D12 are entitled to rely on the original version of Wright5.