



Neutral Citation Number: [2022] EWHC 2251 (Ch)

Case No: BL-2021-000313

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

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
London, EC4A 1NL

Date: 06/05/2022

Before:

THE HONOURABLE MRS JUSTICE FALK

Between:

TULIP TRADING LIMITED
(a Seychelles Company)

Respondent/
Claimant

- and -

(2) WLADIMIR VAN DER LAAN
(3) JONAS SCHNELLI
(4) PIETER WUILLE
(5) MARCO FALKE
(6) SAMUEL DOBSON
(7) MICHAEL FORD
(8) CORY FIELDS
(9) GEORGE DOMBROWSKI
(10) MATTHEW CORALLO
(11) PETER TODD
(12) GREGORY MAXWELL
(15) AMAURY SÉCHET
(16) JASON COX

Applicants/
Defendants

(1) BITCOIN ASSOCIATION FOR BSV
(a Swiss verein)
(13) ERIC LOMBROZO
(14) ROGER VER

Defendants

APPROVED JUDGMENT

APPEARANCES

MR J. WARDELL QC, MR B. FRIEDMAN and MS S. CARMICHAEL for the **Claimant**

MR J. RAMSDEN, QC for the **Second to Twelfth Defendants**

MR M. THORNE for the **Fifteenth and Sixteenth Defendants**

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MRS JUSTICE FALK:

Costs

1. I will first give my ruling on costs in respect of the hearing in March, my decision in relation to which is reported at [2022] EWHC 667 (Ch) (the “Decision”). As in the Decision, references below to the Defendants exclude Defendants who did not participate in the jurisdiction challenge the subject of the March hearing, namely the First, Thirteenth and Fourteenth Defendants.
2. The parties have agreed that detailed assessment, and any issue about the basis of assessment, should be avoided by a summary assessment that awards 75% of the costs reflected in the costs schedules of the Defendants in respect of the jurisdiction challenge.
3. The primary issue is whether the Defendants should recover only a proportion of their costs, using an issues-based approach. The Claimant (“TTL”) says that there were four issues, namely whether there was a serious issue to be tried, whether TTL satisfied the jurisdictional gateways, whether England was the proper forum and whether there was a breach of the duty of full and frank disclosure. TTL further maintains that it succeeded on three out of four of those issues. It says that the appropriate award is 25% of the Defendants’ costs, meaning an award of 25% of 75% of the total amounts in the costs schedules.
4. The Defendants say that no departure is appropriate from the general rule that, as successful parties, they should receive their costs and, furthermore, that TTL’s challenge is essentially to the reasonableness of the costs, an issue that is already covered by the contractual agreement to pay 75%.
5. I made it clear to the parties before the hearing that I expected them to address the concerns I had raised at para.13 of my judgment about the extensive factual evidence filed in relation to the jurisdiction challenge. They have done so, for which I am grateful.
6. I disagree with TTL’s principal submission. The test of serious issue to be tried, on which TTL lost, is a critical hurdle that must be surmounted in every case. The result was that the Defendants undeniably won overall on the single question, which was whether permission should be granted to serve out of the jurisdiction. As regards gateways and forum, I agree that TTL would have succeeded on those points, but my comments were obiter and expressly included only because of a possible appeal: see paras. 138 and 166 of the Decision. This was not really a question of separate issues.
7. Mr Wardell, for TTL, accepted that it could not be said that TTL had succeeded on part of its case, within CPR 44.2(4)(b). Equally, it cannot be said that there was any distinct part of the proceedings in respect of which TTL succeeded, within CPR 44.2(6)(f). Based on the White Book, those are the two provisions on which reliance was placed to justify an issue-based costs order.

8. Mr Wardell also submitted that there should be a further breakdown of the serious issue to be tried question into sub-issues. I do not agree that that is a legitimate approach. The question of serious issue to be tried is at most a single issue or, as I would regard it, part of the broader single question of whether to grant permission to serve out.
9. A further point is that TTL would always have been required to persuade the court about each of the components of the test for permission to serve out. It follows that, in their challenge to the initial decision in TTL's favour, the Defendants would have needed to consider TTL's application in detail. In the circumstances, it was not inappropriate for the Defendants to challenge each aspect, including, for example, the legal tests to apply in relation to the gateways.
10. The Defendants were also entitled to point out deficiencies in the evidence about ownership of the bitcoin and the hack. I accept Mr Wardell's point that these points were dealt with fully in the initial application to serve out, but there were nonetheless further issues that were raised by the Defendants, for example about the date of incorporation of TTL.
11. Overall, I am not persuaded that there is a good reason to depart from the general rule that costs follow the event by making an issues-based costs order. I do not consider that this is, in reality, a case where there are different issues such that an issues-based award might be appropriate.
12. What became clear during submissions was that Mr Wardell's main complaint was not really about separate issues but about reasonableness and, in particular, reliance on CPR 44.2(5)(b) and (c), namely whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue, and the manner in which they have done so.
13. It should have been clear from the Decision, in particular para.13, that I did have some concerns about that. I also had some concerns about the issue of full and frank disclosure, where material allegations were made and not, as I believe I explained in the Decision, perhaps set out with the specificity with which they should have been.
14. However, in my overall approach I must have regard to the fact that the parties have reached an agreement about costs, which is recorded in correspondence which I have been shown. The terms of that agreement appear to me to be clear. The agreement recognises that the court may make a reduction by reference to an issues-based approach, but it otherwise provides that 75% of the costs of the Defendants are reasonable and recoverable.
15. Given that agreement, and given the way in which TTL has put its case to me, which is not really grounded on an issues-based approach but is rather one based on reasonableness, I do not consider that I should make any further reduction beyond the 25% reduction that has been agreed.
16. I have considered this point with some care. It is not entirely straightforward for the court to be in a position where an agreement has been reached in

relation to matters about which the court has raised significant concerns. However, I feel somewhat less concerned having looked at the actual quantum of costs in the costs schedules, which do not appear to be manifestly excessive, and, in particular, having had regard to the submissions that indemnity costs would otherwise have been sought (although I am not saying they would have been obtained), and to my understanding that the 75% figure was intended to take account of the comments made in the Decision.

17. Therefore, overall, because I do not think that an issues-based approach is appropriate in this case, the costs awarded in respect of the jurisdiction challenge are 75% of the amounts shown in the costs schedules.

Permission to appeal

18. I now turn to the application for permission to appeal. I am not giving permission. As has been commented (not by me), the Decision was based on orthodox principles and Court of Appeal, House of Lords and Supreme Court authorities.
19. As to whether there is a compelling reason for an appeal to be heard, I am not prepared to confirm that there is such a compelling reason. Should there be a renewed application to the Court of Appeal, that is a matter that can properly, and no doubt will, be considered by it in due course. I have seen that the Defendants have made some specific comments in relation to that aspect. In relation to those points I would just say that, under the Court of Appeal's normal practice, the Defendants would obviously have an opportunity to make any comments they wish to make before the Court of Appeal determine whether to grant permission to appeal. It would not be appropriate for me to expand further on that aspect.
20. What I will say about my decision not to grant leave on the basis of real prospect of success is, first, that the Decision took full account of the fact that this is a developing and complex area of law, and the arguments put on behalf of TTL that the case should not be determined without full evidence. Secondly, as to the alleged factual findings and the apparent dichotomy, it is said, between what I said in the Decision about assuming TTL's factual case and then, TTL says, making findings against it, I did make assumptions in TTL's favour in key areas, such as the nature of the networks and the developers' ability to make changes to them, and the position in relation, for example, to the nodes.
21. The points identified in the application for permission to appeal relate to facts that I consider that I was entitled to find or to take into account. For example, based on my understanding, the facts in question were not part of the real factual battleground, they were obvious, they have been misdescribed in the grounds or they were not actually relevant to the Decision. My point about private keys was, I believe, also wholly uncontroversial.
22. The criticism made about my reference to the Law Commission relates to a point that I believe that I was fully entitled to make. I also disagree with the

criticism of my analysis in relation to loyalty, which is a defining feature of a fiduciary obligation.

23. The issue over ability to amend TTL's statement of case and whether an opportunity should have been given to amend (relating to paras. 114-125 of the Decision), is really a separate point and does not impact the key difficulties TTL had in relation to the existence of fiduciary or tortious duties. It was also raised very late, and without even a late application to amend.
24. Accordingly, I refuse permission to appeal.

(For proceedings after judgment see separate transcript)