IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION
[2022] EWHC 2784 (Ch)

No. BL-2021-000313

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday 21 October 2022

Before:

MASTER CLARK

B E T W E E N :

TULIP TRADING LIMITED — Claimant

- and -

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

J U D G M E N T

(via Microsoft Teams)

A P P E A R A N C E S

BOBBY FRIEDMAN (instructed by Ontier LLP) appeared on behalf of the Claimant.

ALEX CHARLTON KC (instructed by Brett Wilson LLP) appeared on behalf of D14.

FIRST to THIRTEENTH, and FIFTEENTH and SIXTEENTH defendants did not attend and were not represented.

MASTER CLARK:

1 This is the claimant's application dated 29 September 2022 seeking

(1) a stay of the application of Roger Ver, the fourteenth defendant ("D14"), challenging jurisdiction; and

(2) an adjournment of the hearing of that application currently listed between 9 and 11 November 2022.

Background

Parties and the claim

2 The claimant claims that the defendants, who are developers of various digital asset networks, own fiduciary and/or tortious duties to it in respect of its digital assets on those networks. The particular factual circumstances in which this issue arises are that the claimant's private keys to its digital assets have been stolen. The claimant asserts that the defendants are under duties to help it or enable it to recover access to those assets. D14 is a developer of one of those networks known as the BCH network. D14 and all of the other defendants are outside the jurisdiction.

Procedural background

3 I turn therefore to the procedural background. On 24 February 2021, the claimant sent a letter before claim to D14, and on the same day issued its claim form. D14's address was stated on the claim form as being in Saint Kitts and Nevis.

4 On 28 April 2021, before service of any of the defendants, an amended claim form was filed in which D14's address was shown as being in Japan.

5 On 7 May 2021, Deputy Master Nurse granted permission to serve D14 in Japan. Effecting service in Japan is a lengthy process requiring translation of all documents into Japanese, and is done through the Foreign Process Service.

6 On 28 May 2021, I made an order extending time for service on certain defendants, including D14, until 24 December 2021.

7 Between June and August 2021, the other defendants issued applications challenging jurisdiction. These were listed to be heard from 28 February 2022. By this stage, D14 had not been served.

8 On 7 December 2021, the Foreign Process Service informed the claimant that service on D14 in Japan had been unsuccessful. On 16 December 2021, Deputy Master Arkush made an order granting the claimant's application to extend time for service of the claim form on D14, permission to serve in St Kitts and Nevis, and to serve by email. On 24 December 2021, D14 was served. On 21 January 2022, he filed an acknowledgement of service indicating intention to challenge jurisdiction.

9 On 3 February 2022, D14 applied for an extension of time to file his jurisdiction challenge application until 28 days after judgment was handed down on the other defendants' jurisdiction challenges. The hearing of those challenges took place on 4 March 2022 before Falk J, who reserved judgment.

10 On 18 March 2022, I made an order extending time for D14 to apply to challenge jurisdiction to 28 days after handing down of Falk J's judgment on the other defendants' applications. That order included recitals that D14 confirmed that

(1) if the other defendants' jurisdiction challenges failed, D14 would not challenge jurisdiction;

(2) if the other defendants' jurisdiction challenges succeeded

(i) D14 would confine any application to issues on which the other defendants succeeded;

(ii) if the claimant successfully appealed the other defendants' jurisdiction challenges before determination of D14's challenge, D14 would withdraw his application and submit to the jurisdiction.

11 On 25 March 2022, Falk J handed down judgment and made an order setting aside service of the claim form on the other defendants on the grounds that there was no serious issue to be tried that developers of digital asset networks owed fiduciary and/or tortious duties of care to the users of those networks.

12 On 11 April 2022, D14 issued his jurisdiction challenge, asking for it to be listed at the consequentials hearing in the other defendants' applications. However, on 21 April 2022, the claimant wrote to D14:

(1) stating that it intended to submit that D14's control of the BCH network was sufficiently dissimilar to the control exercised by the other defendants in respect of the BTC/BCH ABC networks that it could not be determined on the same basis as the other applications; and

(2) suggesting that D14's jurisdiction challenge should be stayed, but if he was not willing to agree to a stay, then it should be adjourned to the next available date convenient to the parties.

13 On 26 April 2022, Falk J's clerk wrote saying she was not willing to determine D14's application at the consequentials hearing or give directions in respect of it.

14 On 29 April 2022, the claimant again wrote to D14 that his jurisdiction challenge should be stayed because its determination would be otiose if the appeal succeeded.

15 D14's response on 3 May 2022 was that, since the claimant did not accept that he was in the same position as the other defendants, his application should be heard promptly and he refused to agree to a stay. He invited the claimant to agree directions for evidence and preparation time for the hearing, and on 4 May, the next day, he proposed the listing of his application as soon as possible so that he could participate in any appeal to the Court of Appeal.

16 On 6 May 2022, Falk J refused the claimant permission to appeal. 6 days later, on 12 May 2022, the claimant wrote to D14 that it now accepted for the purposes of D14's application that there was no material difference between his and the other defendants' position as to whether there was a serious issue as to the fiduciary and/or tortious duties owed and, again, proposed a stay of the application on the basis that:

(1) D14 be allowed to participate in the appeal;

(2) If the claimant's appeal failed, the claimant would not pursue the claim against D14; and

(3) If the claimant's people succeeded, D14 would withdraw his application and submit to the jurisdiction.

17 On 27 May 2022, D14 rejected the claimant's proposal and invited the claimant to enter into a consent order granting his application. On the same day, 27 May, the claimant filed its appellant's notice in respect of Falk J's orders of 25 March 2022 and 6 May 2022.

18 On 8 June 2022, the claimant rejected D14's proposal of a consent order on the grounds that a consent order could not be the subject of an appeal, sought confirmation that D14's application would not be listed, and said that unless D14 agreed to a stay, it would apply for a stay.

19 On 17 June 2022, D14's jurisdiction challenge was finally listed to be heard floating on 9 to 11 November. On the same day, the claimant wrote agreeing not to oppose an order that the order for service on D14 be set aside provided:

(1) the primary relief on D14's application was granted for reasons identical to those set out in the judgment of Falk J; and

(2) if the claimant obtained permission to appeal Falk J's order in relation to the other defendants, then it should have permission to appeal the setting aside of the order for service out on D14 for the same reason.

The claimant also agreed to pay D14's reasonable and proportionate costs of its application to be assessed as a detailed assessment, and it enclosed a draft order reflecting its proposal.

20 On 27 June D14 responded with various counterproposals, including, most importantly, that the claimant make an interim payment in respect of his costs.

21 The claimant's response, on 7 July 2022, did not accept that an interim payment was appropriate, and maintained its position that D14's costs should be assessed at a detailed assessment. It put forward a revised draft order providing for the 2 orders giving permission to serve D14 out of the jurisdiction to be set aside, costs as I have set out, and at para.4:

> "In the event that it obtains permission to appeal the 25 March order, the claimant shall have permission to appeal paras.1 - 3 of this order [that is, as to setting aside service and costs] on precisely the same grounds that it is granted permission to appeal the 25 March order."

22 On 5 August 2022, D14 replied agreeing to some but not all of the claimant's proposed order, and put forward its own revised draft order which still included provision for payment on account of costs.

23 On 11 August 2022, Andrews LJ granted the claimant permission to appeal and the claimant received her order on that day. It was served on D14 5 days later, on 16 August.

24 On 31 August 2022, the claimant wrote to the defendant that:

> "The position in relation to Mr Ver [i.e. D14] and the draft order under discussion and enclosed with your letter [i.e. the counter

> proposal] falls to be substantially reviewed in the light of recent material developments to the underlying factual position."

25 Those developments were said to be the grant of permission to appeal, and an indication from the Civil Appeals Office that the appeal could be heard as early as the week commencing 28 November. The claimant asked D14 to agree to the adjournment of his application.

26 On 5 September 2022, D14 rejected the claimant's suggestion of an adjournment or stay of his application. There was then further correspondence between the parties on this topic.

27 On 13 September 2022, the appeal was listed to be heard on 7 to 8 December 2022. On 16 December, D14 wrote to say he would agree to a draft order in the terms of the draft sent by the claimant on 7 July, to which I have already referred, and part of which I have set out. This application was issued, as I have said, on 29 September 2022.

Legal principles

28 The power to stay or adjourn is found in CPR 3.1(2)(b) and (f). Those powers are discretionary and to be exercised in accordance with the overriding objective. The claimant submitted there was a well-established principle that a stay should be granted where a pertinent point of law and issue was about to be determined. In support of this proposition, he referred me to 9A-182 of the 2022 White Book and two authorities: *Kingcastle Ltd v Owen-Owen* [1999] Lexus citation 2050); and *Johns v Solent SD Ltd* [2008] EWCA Civ 790. However, it is clear, in my judgment, from these authorities that the claimant puts the position too high. In my judgment, the principles to be derived from this case law are:

(1) The discretion to stay is an open one (*Kingcastle*, p.3).

(2) Whether the discretion should be exercised depends on all the circumstances of the case (Lord Evershed MR in *Re Yates' Settlement Trust* [1954] 1 WLR 564 at 567, cited in *Kingcastle*;

(3) In exercising the discretion, the main consideration is the balance of prejudice (*Kingcastle*, p.3).

29 The claimant also relied upon *Derby v Weldon (No.3)* [1989] 3 All ER 118 and *Johns* as authorities for the proposition that the court cannot strike out a claim as having no real prospect of success when a higher court may be about to rule that the point in question does have a real prospect of success. That proposition is not found in *Johns* nor is it found in *Derby v Weldon*, which is authority for the much more limited proposition found in the first sentence of the head note:

> "Where the court was asked to strike out a claim on the ground that, applying principles established by a recent decision of the Court of Appeal, the facts alleged, which were necessarily hypothetical, did not give rise to any course of action, the court in exercising its discretion whether to strike out the claim, was not bound to apply the law as so stated by the Court of Appeal but was entitled to take into account the possibility that the decision might be reversed by the House of Lords."

Balance of prejudice

30 I turn to consider, therefore, the balance of prejudice in the circumstances arising here, which, as I have said, the authorities establish is the main consideration.

Unnecessary costs

31 The claimant submitted that if the application is heard, it will incur substantial and unnecessary costs in relation to it. As I have set out, the claimant has now accepted that, for the purposes of D14's application, there is no material difference between him and the other defendants. However, the claimant says that at the hearing of D14's application, it would advance two categories of arguments which were not put forward at the hearing of the other defendants' applications:

(1) it would argue that since Andrews LJ has held that the claimant has a real prospect of success in its appeal, it cannot be said that the claimant has no real prospect of success in establishing the duties it relies upon;

(2) the claimant would wish to argue that the decision of Falk J, which is only persuasive and not binding on another High Court judge, is wrong.

32 The costs associated with these arguments and D14's costs of the hearing would, the claimant submitted, not be incurred if the application is adjourned to be determined after the appeal, because:

(1) the claimant has accepted that if its appeal fails, it will not oppose D14's application; and

(2) D14 has accepted that if the jurisdiction challenges of the other defendants fail, then subject to any appeal, he will not challenge jurisdiction.

33 These costs, the claimant submitted, would be a substantial prejudice to it which could be obviated by adjourning D14's application.

34 As to this, first, I note that if the claimant's appeal succeeds, then it would be entitled to recover its costs of the application, so the prejudice it relies upon would only arise if it fails on appeal. Secondly, the future costs claimed by D14 for the application said to be in the region of £150,000 are, I accept, substantial. I have difficulty in seeing how costs at this level could be reasonable and proportionate and would anticipate a significant reduction of them on assessment. Thirdly, I do not consider that the costs of the first argument the claimant would seek to rely upon are likely to be substantial. The point can be stated and, in my judgment, could be argued quite shortly.

35 Fourthly, as to the second head of argument the claimant would wish to rely upon, I accept that the costs of doing so would be significant. However, those arguments could and no doubt will be raised in the appeal. In my judgment, that is the appropriate occasion at which to raise them. If the claimant also wishes to make those arguments on D14's application so as to have, as they say, two bites at the cherry, then the costs of its doing so are not, in my judgment, properly to be regarded as prejudice to it.

36 In any event, the prejudice sought to be relied upon by the claimant is, contrary to its counsel's submissions, materially different from the prejudice identified in the *Kingcastle* and *Johns* cases. In those cases, the effect of refusing the stay would have been that the applicant's claim would have been dismissed, and because the point of law under appeal arose in different proceedings, that dismissal would be final. As it was put in *Johns*, her claim would be "snuffed out".

37 In this case, refusing the stay would not prevent the claimant from opposing D14's jurisdiction challenge. It may do so by way of appeal unlike the applicants in *Kingcastle* and *Johns*.

Procedural chaos

38 The claimant also submitted that procedural chaos would result from not staying the application, because, he said, whatever the outcome of D14's application, if determined before the appeal, there would be a second appeal.

39 If D14's application is determined before the currently listed appeal, there would, it submitted, be insufficient time for the second appeal to be listed at the same time. I do not accept this. The issues arising in the second appeal would be identical to those in the first appeal, and the Court of Appeal has the flexibility to deal with appeals requiring expedited listing.

40 Alternatively, the claimant submitted, D14's application might not be determined until after the Court of Appeal hearing. I consider that unlikely. If it did occur, and judgment was given before judgment by the Court of Appeal, then no doubt the time for appealing that judgment could be extended until after the Court of Appeal judgment. If the Court of Appeal delivered judgment before judgment on the application, the judge hearing the application would be obliged to take that decision into account.

41 I do not therefore accept procedural chaos suggested by the claimant would, in fact, result.

Claimant's draft order of 7 July 2022

42 If I am wrong in rejecting the claimant's argument that it would suffer prejudice in costs and/or wrong about the procedural chaos, I consider that the claimant has the opportunity to avoid those consequences by not opposing an order in the form it put forward on 7 July 2022. Although having made a counter offer, it was not open to D14 to accept that offer. D14's purported acceptance of that offer stands, in my judgment, as an open offer on those terms.

43 The claimant's position was that there had been material changes in circumstances since it put forward the draft order, namely the granting of permission to appeal and the early listing of the appeal. These, it said, changed the basis from that on which the draft order had been put forward. However, as set out earlier, the draft order expressly provides for the claimant to have permission to appeal that order **if it obtains permission to appeal Falk J's order**. The granting of permission is therefore expressly contemplated by the order itself. I accept that the early listing of the appeal was not contemplated but for reasons already given, I do not consider that that is a sufficiently material change in circumstances.

Prejudice to D14

44 I turn to consider the prejudice to D14.

45 First, D14 submitted that the "whole thrust" of Part 11 is that a challenge to the court's jurisdiction should be dealt with promptly, referring me to *Cavell USA Inc & Anor v Seaton Insurance Company & Anor* [2008] EWHC 876 (Comm) at [23] *per* Flaux J (as he was). In *Cavell*, Flaux J refused to order a stay of a Part 11 challenge to await a decision in foreign proceedings considering, among other things, that delay would subvert the Part 11 regime: see in particular [23] - [24]. I agree, but in this case, the claimant has agreed that if the other

defendants succeed in the appeal, then it will not oppose D14's application. The scope for delay is therefore very limited.

46 The primary prejudice to D14, in my judgment, is being deprived of what would otherwise be its right to be a party to and heard on related appeals. The claimant has agreed that it would not oppose D14 being granted permission to be heard on the appeal, and that if the appeal failed, it would pay D14's costs of the application and of the claim. In the course of the hearing before me, the claimant also agreed to pay D14's costs of appearing on the appeal if it failed. However, none of this can guarantee that the Court of Appeal would, in fact, allow D14 to make submissions, in circumstances where he is not a party to the appeal.

47 In addition, if he is not a party to the appeal and there is a further appeal to the Supreme Court, he will not be a party to that, and will not have a right to appeal in that appeal. This, in my judgment, constitutes significant prejudice. On the other hand, if the claimant does not oppose the draft order, then there is a realistic prospect that both appeals can be determined at the same time and D14 will then undoubtably be entitled to be represented at the appeal hearing.

48 Finally, D14 submitted, that if his application succeeded, he would be entitled to payment of his costs, and the delay in determining his application prejudiced him because it delayed payment of those costs. However, as I have already concluded, I do not consider that substantial delay is likely to occur. In any event, the claimant agrees to pay interest on the judgment rate on any sum found due for the period of 11 November 2022 to the date when the Court of Appeal hands down judgment.

49 In addition, D14 has applied for security for its costs and the principle that security should be provided is accepted by the claimant. D14 will therefore be protected from the risk of non-payment of his costs. I do not therefore consider this as a factor in D14's favour.

Other Factors

50 Finally, I turn to other factors I consider to be relevant to the exercise of my discretion.

51 First, the primary reason why Falk J declined to extend her order to D14's application was the claimant's position, no longer maintained that for the purposes of D14's application, that there were material differences between its claim against D14 and against the other defendants. If that concession had been made before the hearing on 6 May 2022, it is likely that Falk J would have determined D14's application in his favour. The claimant should not, in my judgment, be allowed to take advantage of that change of position to delay the determination of D14's application, or deprive him of an opportunity to be heard at the appeal.

52 Secondly, as D14 submitted, every application should be made as soon as it becomes apparent that it is necessary and desirable to make it (CPR Practice Direction 23A, para.2.7). That is particularly apposite in this case. The claimant first suggested a stay in April 2022, and D14's consistent position since that date has been that a stay is not appropriate. Despite that, the claimant's application was not made until 29 September 2022. For reasons I have given, I do not accept granting of permission to appeal or the early listing of the appeal on material changes in circumstances justifying the lateness of the application.

53 Thirdly and finally, if the claimant had agreed not to oppose the July draft order, and had not changed its position following the grant of permission to appeal, the court would have made

an order in that form in August or early September, and there would have been ample time to arrange for the two appeals to be heard together.

54 For these reasons, therefore, I dismiss the claimant's application for a stay.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.