Neutral Citation Number: [2023] EWHC 1893(Ch)

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

Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 25th July 2023

Before :

THE HON MR JUSTICE MELLOR

- -

Claim No. IL-2022-000035

Between :

(1) DR CRAIG STEVEN WRIGHT	**Claimants**
(2) WRIGHT INTERNATIONAL INVESTMENTS LIMITED	
- and -	
(1) COINBASE GLOBAL, INC.	**Defendants**
(2) CB PAYMENTS, LTD	
(3) COINBASE EUROPE LIMITED	
(4) COINBASE, INC.	

Claim No. IL-2022-000036

Between :

(1) DR CRAIG STEVEN WRIGHT	**Claimants**
(2) WRIGHT INTERNATIONAL INVESTMENTS LIMITED	
- and -	
(1) PAYWARD, INC.	**Defendants**
(2) PAYWARD LTD.	
(3) PAYWARD VENTURES, INC.	

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Michael Hicks and **Racheal Muldoon** (instructed by ONTIER LLP) for the **Claimants**
Kathryn Pickard (instructed by Allen & Overy LLP) for the **Coinbase Defendants**
Philip Roberts KC and **Alaina Newnes** (instructed by Reynolds Porter Chamberlain LLP) for the **Kraken Defendants**

Hearing dates: 25th & 26th May 2023

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on the National Archives and other websites. The date and time for hand-down is deemed to be Tuesday 25th July 2023 at 10.30am.

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THE HON MR JUSTICE MELLOR

Mr Justice Mellor:

INTRODUCTION

1. This is my judgment dealing with various issues which arose at the first and joint CMC in these two cases, although I have prepared the bulk of this judgment following a second CMC in all four of the actions which involve Dr Wright which took place on 15th June 2023. It is convenient to refer to the two sets of Defendants and each action as the Coinbase and Kraken Defendants/Action or generally as the Ds. In both actions, the cause of action asserted by Dr Wright and his company is passing off.

2. The First Claimant, Dr Wright or C1, claims to be the creator of the Bitcoin System, the person who wrote the original Bitcoin code and the author of the White Paper, a document entitled *Bitcoin: A Peer-to-Peer Electronic Cash System*, which essentially describes the Bitcoin System. He claims he was the person who made the White Paper available to the public on 31 October 2008 under the pseudonym *Satoshi Nakamoto.* The Second Claimant (C2) is one of Dr Wright's companies. I will refer to the Claimants generally as the Cs.

3. There are two other actions in the Business & Property Courts involving Dr Wright ('the COPA action' and 'the BTC Core action' (see further below)) and there is a common issue in all four actions – what has been called 'the identity issue', namely, whether it was Dr Wright who adopted the pseudonym *Satoshi Nakamoto* when announcing his creation of the Bitcoin System or whether Dr Wright was or is *Satoshi Nakamoto*. In this judgment I use the expression 'the identity issue' at that rather general level. As I shall describe later, it is undoubtedly the case that other, more detailed issues, surround the identity issue in each of the four actions.

4. In the lead up to this first CMC, the issues presented for resolution were:

    i) The Coinbase and Kraken Defendants' application to stay this action pending the judgment at first instance in an earlier action, the COPA action (see further below).

    ii) The Coinbase and Kraken Defendants' application for security for costs.

    iii) Cross-applications to strike out and amend certain paragraphs in the Defences - these raised a *Hollington v Hewthorn* point – plus a further proposed addition to paragraph 64(a) of the Defences. Save for these disputed paragraphs, the Cs consented to other proposed amendments to the Defences.

    iv) The Coinbase Defendants' application for better responses to a number of requests for further information.

    v) The issues raised in the DRD.

5. However, very shortly before Skeletons were due to be exchanged, the solicitors then acting for the Cs wrote on 17th May 2023 to all of Dr Wright's opponents in all four actions suggesting that, since the identity issue arose in all four actions, it should be tried by way of preliminary issue. In more detail, the proposal was that four sub-issues collectively made up the Identity Issue(s), namely:

i) Whether Dr Wright is the author of the Bitcoin White Paper (the 'Authorship Issue').

ii) Whether Dr Wright is the author of the Bitcoin source code and the accompanying executable file released in January 2009 under the Satoshi Nakamoto pseudonym and thereafter authored and issued further releases of the Bitcoin Code until the last release under that pseudonym of version 0.3.19 on 13 December 2010 ('the Code Issue').

iii) Whether Dr Wright, using the pseudonym, is the person who made the public postings and sent emails to individuals (e.g. Wei Dai and Mike Hearn) regarding the White Paper, the Bitcoin Code and the Bitcoin System generally between August 2008 until the email from Satoshi Nakamoto to Gavin Andresen of 26th April 2011 ('the Communication Issue').

iv) Whether Dr Wright is the person who mined the early blocks in the Bitcoin Blockchain which are generally considered to have been mined by the creator of the Bitcoin System ('the Mining Issue').

6. This was a belated but necessary realisation of the issue common to all four actions.

7. At the start of the CMC hearing, I announced my *preliminary* view that the identity issue should be tried once and once only and that should take place in the COPA action set to start in January 2024. This view was necessarily preliminary in several respects but primarily because those parties in the four actions not part of the passing off actions were not represented at the hearing of the CMC, although I suspect all those represented by solicitors were observing. My view was also preliminary because, as the authorities make clear, before a preliminary issue should be ordered, it is necessary for the Court to identify with suitable precision what is and what is not to be tried in the preliminary issue.

8. In an ideal world, this issue would have been raised and been the subject of discussion well in advance of this joint CMC, in sufficient time to have all four actions before the Court. Since that could not happen in time for the hearing of the first CMC, I gave directions which fortunately led to the second CMC being heard within a relatively short time. As will be seen below, a number of issues live at the first CMC had to be the subject of further consideration at the second, expanded CMC.

The four actions involving Dr Wright

9. As I informed the parties in January 2023, all four actions have been docketed to me.

10. The first action in time is IL-2021-000019 between *Crypto Open Patent Alliance v Craig Steven Wright* and I refer to it as the COPA action. The Claimant COPA, represented by Bird & Bird LLP, sues '*for itself and as Representative Claimant on behalf of Square, Inc., Payward Ventures, Inc. (DBA Kraken), Microstrategy, Inc., and Coinbase, Inc.'*. The principal relief sought by COPA is declarations that Dr Wright is not the author of the Bitcoin White Paper, not the owner of copyright in the White Paper and that any use by COPA of the Bitcoin White Paper will not infringe any copyright owned by Dr Wright.

11. Directions down to trial were given in the COPA action by Master Clark back in September 2022 and the trial of 20 days duration, floating in a 5-day window, was listed to commence in late January 2024. For listing reasons, the commencement of that trial has been brought forward and will start soon after the start of the new term. As may be expected, the COPA proceedings are well advanced and the parties have devoted considerable time and money to complying with the directions down to trial. In those proceedings, Extended Disclosure was given in early March 2023 and certain directions relating to disclosure are currently being followed. At the time of the hearing, the next main event was exchange of witness statements by 7th July 2023, subsequently extended to 28th July 2023.

12. In the COPA action, Dr Wright has secured an order for security for his costs in a series of tranches which total £2.9m.

13. The Coinbase and Kraken Actions were issued on the same day. The claims are for passing off in relation to the digital asset **Bitcoin.** The Cs claim to own the goodwill in the term Bitcoin. The Cs say that the Bitcoin electronic cash system has certain important and essential defining characteristics including those which are designated as the "Bitcoin Characteristics". These are listed in paragraph 17 of the PoC and are said to found causes of action in passing off sufficient to prevent third parties from using that term in relation to digital assets with tickers BTC and BCH. For the purposes of these proceedings, the Coinbase Defendants accept they are a group of companies operating different aspects of an online exchange which is used by consumers in the UK and elsewhere, and one aspect of that exchange involves services relating to trading in digital assets, including BTC and BCH. Similarly, the Kraken Defendants comprise a group of companies headquartered in the USA operating an online exchange for trading in digital assets (including BTC and BCH) which is used by consumers in the UK and elsewhere.

14. The fourth action is IL-2022-000069 between Dr Wright (and two companies) and 26 Defendants (*Wright v BTC Core*), which I refer to as 'the BTC Core action'. In this action, Dr Wright claims to be the owner of certain database rights which he says subsist in three databases, namely (i) the Bitcoin Blockchain, (ii) the Bitcoin Blockchain as it stood on 1 August 2017 at 14.11 – up to and including block 478,558 and (iii) another part of the Bitcoin Blockchain made in a particular period (the details of which do not matter for present purposes). Dr Wright also says he (or one of the Claimants) owns the copyright which subsist in the White Paper.

15. For completeness, the claimants in the BTC Core action also claim to own the copyright in the Bitcoin File Format. I refused permission to serve that part of the claim out of the jurisdiction on the basis that I found in my judgment [2023] EWHC 222 (Ch) that the claimants had no prospect of success in establishing that copyright subsisted in the Bitcoin File Format. The Court of Appeal have recently disagreed: see [2023] EWCA Civ 868 and permission to serve out has therefore been granted.

16. In the BTC Core action, the Particulars of Claim divide the 26 defendants into seven groups. Most, but not all, of the defendants have responded to service of the claim upon them and most of those are represented, by my count, by six firms of solicitors. The Coinbase Defendants (represented by Allen & Overy LLP) in 00035 are the 21st-24th defendants in that action. Some of those represented by COPA in the COPA action are also defendants in other actions. At the time of the first CMC, Dr Wright

and associated companies were represented by a different firm of solicitors in the BTC Core claim (Harcus Parker Ltd).

17. The precise details of all the representation and interrelationships between parties to the four actions do not matter for present purposes because the details I have set out illustrate the general point that, to the extent that co-ordination is required of all four actions, it involves many companies and many legal representatives.

18. As I understand matters, the motivation for Dr Wright bringing the Coinbase, Kraken and BTC Core actions is his objection to two 'Airdrops', each of which effected what he terms 'significant' changes to his Bitcoin System and which deviated from the principles and protocols he alleges he had created and specified. His case is that the first Airdrop occurred on 1 August 2017 and resulted in what Dr Wright calls the BTC Network. Nodes on the Bitcoin Network continued to operate the existing Bitcoin System but the Airdrop effectively created a branch in the chain, so that from block 478,558, the Bitcoin Blockchain continued adding blocks mined by its nodes thereby extending the Bitcoin Blockchain, with the BTC Blockchain running in parallel. The ticker 'BTC' has been adopted for the digital cash system operated by the BTC Network.

19. Dr Wright's case is that the second Airdrop occurred on 15 November 2018 and created another new peer-to-peer network (the 'current BCH Network'), again which Dr Wright says implemented significant changes to the Bitcoin System he alleges he created. So from that date another parallel blockchain emerged, this called the BCH Blockchain. The ticker BCH is used for the digital cash system operated by the BCH Network.

20. Although Dr Wright says he did not coin the ticker BSV (Bitcoin Satoshi Vision), it is now used to designate the original Bitcoin digital cash system.

21. Reverting to the two passing off cases, Dr Wright claims to be able to prevent the use of the term Bitcoin in relation to the BTC and BCH systems. At the heart of those claims is his allegation that for something to be called 'Bitcoin' it must have a set of characteristics (referred to in both Particulars of Claim as 'the Bitcoin Characteristics').

22. The Defendants defend the actions on various grounds including (i) Dr Wright is not Satoshi Nakamoto, (ii) no actionable misrepresentation is made because the terms Bitcoin and Bitcoin Cash are (and have been at all material times) the terms used by the relevant public in the UK to describe BTC and BCH respectively and (iii) no damage has been or can be caused by reason of statements made to the public by the Defendants.

23. In the BTC Core action, Dr Wright's case is that the database rights and copyrights which he/the Claimants own provide a mechanism by which he can prevent the further operation of the BTC Blockchain and the BCH Blockchain without his consent.

24. Both the BTC Blockchain and the BCH Blockchain contain the Bitcoin Blockchain up to and including block 478,558. Dr Wright's claim is that the operation of the BTC

Blockchain and the BCH Blockchain result in the extraction and/or re-utilisation of all or substantial parts of the Databases in which he owns database right.

25. The White Paper is included in block 230,009 of the Bitcoin Blockchain. There is no difficulty in literary copyright subsisting in the White Paper. The consequence is that use of the BTC Blockchain and the BCH Blockchain entails reproduction of block 230,009 and reproduction of the entire White Paper, all done, so Dr Wright alleges, without his consent as the copyright owner.

26. Against that background, I can turn to the issues presented for resolution at this CMC. However, since the Ds' stay application was in essence deferred to the second CMC, in the end it is only necessary for me to determine issues (ii) and (iii) (as listed above) in this Judgment.

THE *HOLLINGTON V HEWTHORN* ISSUE

The issue explained

27. Taking the applications to amend into account, both sets of Defendants want Paragraph 33 of their Defences to read as follows:

> "33. The First Claimant is and has been involved in various proceedings, in this jurisdiction and overseas, in which his evidence (including documentary evidence adduced by him) has been the subject of serious adverse comment. By way of example:
>
> (a) *Wright v Ryan & Anor* [2005] NSWCA 368;
>
> (b) Investigation by the Australian Tax Office in 2014;
>
> (c) *Ang v Reliantco Investments* Ltd [2020] EWHC 3242 (Comm);
>
> (d) *Kleiman v Wright* US District Court, South District of Florida, Case No. 18-cv-80176;
>
> (e) *Wright v McCormack* [2022] EWHC 2068 (QB); and
>
> (f) *Granath v Wright* – Judgment of the Oslo District Court dated 20th October 2022 (Case No. 19-076844TVI-TOSL/04), in which the Oslo District Court found that statements made by Magnus Granath in March 2019 that the First Claimant was not Satoshi Nakamoto were not unlawful. The Oslo District Court held that: "The court believes that Granath had sufficient factual grounds to claim that Wright had lied and cheated in his attempt to prove that he is Satoshi Nakamoto" and further that: "…the court believes that Granath had sufficient factual grounds to claim that Craig Wright is not Satoshi Nakamoto in March 2019"; and
>
> (g) Wright v McCormack [2022] EWHC 3343 (KB)."

28. The Cs seek to strike out each Paragraph 33 under CPR 3.4(2)(b) as an abuse of process or otherwise likely to obstruct the just disposal of proceedings, relying on the rule in *Hollington v Hewthorn* [1943] 1 KB 587 CA in support of their application.

29. The Ds accept: (1) that the principle enunciated in *Hollington v Hewthorn* remains good law today and (2) the principle is that a decision of another court or tribunal is inadmissible as evidence of the truth of those findings. They say, however, that the rule does not prohibit the admissibility of such evidence for other purposes.

30. The Ds point to Paragraph 34 in each Defence which must be read with Paragraph 33:

> "34. Accordingly, where the Claimants are required to prove facts or matters relied upon in their PoC, the Defendants will require strict proof of the same, including by reference to contemporaneous documents and other corroborative evidence."

31. Then the Ds submit as follows:

> 'As is plain from the face of the pleadings, and as confirmed in correspondence, the Defendants do not rely upon the decisions cited as evidence of the truth of those findings. Instead, those decisions are referred to as reason why the Defendants require the Claimants to substantiate their various assertions with hard evidence: contemporaneous documents and/or credible corroborative testimony. In circumstances where the First Claimant's evidence on relevant matters has been repeatedly undermined and disbelieved in the past, the Defendants are entitled to explain why they contend that the First Claimant's assertions should not be taken at face value.
>
> It is therefore perfectly proper to plead, as the Defendants have done, that because of the adverse comment made by other tribunals about the evidence of Dr Wright, strict proof will be required of all facts and matters relied upon by the Claimants in these proceedings (see Crypto Open Patent Alliance v Craig Steven Wright [2021] EWHC 3440 (Ch) at §§62-67). Such a plea is plainly relevant and material as it supports the plea made in paragraph 34 (which the Claimants do not seek to strike out).'

32. The Cs characterise paragraph 34 as the hook by which the Ds are seeking to justify the inclusion of paragraph 33.

Applicable Principles

33. The Cs relied on the explanation of the rule in *Rogers v Hoyle* [2014] EWCA Civ 257; [2015] QB 264 (per Christopher Clarke LJ (with whom Arden and Treacy LJJ agreed)):

> '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.'

34. The Cs also referred to *Jinxin Inc v Aser Media Pte Limited* [2022] EWHC 2431 (Comm) ("***Jinxin***"), in which the Deputy Judge (Peter MacDonald Eggers KC) had to consider a *Hollington v Hewthorn* issue in the context of an action for deceit. The deputy judge in *Jinxin* considered a similar issue to that which arises before me and concluded that one could not avoid the rule by saying that findings of fact in earlier judgments could be mentioned in the pleading because they provide a basis for adopting a particular approach to pleading the case. He said:

> '[87] … the decision in *Medcalf v Mardell* [2002] UKHL 27; [2003] 1 AC 120, para. 21-22, 79 was not concerned with what inadmissible evidence is or is not appropriate to plead. Instead, it was concerned with the separate question of what the pleader may legitimately take into account in deciding whether to plead a case of fraud or dishonesty; such a pleader may justify the pleading of a serious allegation of fraud or dishonesty by reference to inadmissible evidence. That does not mean however that such inadmissible evidence can be pleaded for any purpose, including the purpose of demonstrating to the Court or the parties to the action that the case of fraud or dishonesty is properly pleaded.
>
> [88] In this respect, I have had regard to the decision of *Crypto Open Patent Alliance v Wright* [2021] EWHC 3440 (Ch) relied on by Mr Beltrami KC, where the Court considered the Chancery Guide equivalent to the Commercial Court Guide at para. C1.3(c), which provides that:
>
> > "(i) Full and specific details should be given of any allegation of fraud, dishonesty, malice or illegality; and
> >
> > (ii) where an inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged must be fully set out."

> [89] With respect to the learned judge in *Crypto v Wright*, I do not read Commercial Court Guide, para. C1.3(c) as permitting a party to plead inadmissible evidence to establish that it has properly pleaded a case of fraud or dishonesty. Instead, I consider that para. C1.3(c)(ii) of the Commercial Court Guide - to which the judge in *Crypto v Wright* directed himself - is concerned with the pleading of facts and matters on the basis of which the Court is being invited to infer that fraud or dishonesty has taken place. Any such facts and matters must be proved by way of admissible evidence and/or must themselves be admissible evidence; if the relevant evidence is inadmissible, it is difficult to see how the Court could draw the inference in question.'

35. Whilst there are exceptions to the rule, none of them apply here. The Ds' reliance on Paragraph 34 is an imaginative attempt to retain these Paragraphs 33, but it is one I am unable to accept. As pleaded, the findings adverse to Dr Wright and his credibility in the decisions referred to are pleaded as findings of fact and as evidence of the truth of those findings. If the only purpose of the references to the decisions in Paragraph 33 was to justify the plea in Paragraph 34, it is my view that this part of the pleading would have been structured very differently. In particular, the purpose of the reliance on the adverse findings would have been made explicit. Although the purported purpose has now been made clear in correspondence, it does not supplant the terms of the pleading. Furthermore, life is far too short to have to refer to correspondence to understand what a pleading meant to say but doesn't.

36. My conclusion is that these Paragraphs 33 offend the rule in *Hollington v Hewthorn* and they will be struck out or permission to amend to include parts refused. In reaching this conclusion, I emphasise I am making no ruling as to what documents or material may or may not be put to Dr Wright in cross-examination (e.g. previous inconsistent statements). Those matters are for the trial judge.

THE ADDITION TO PARA 64(a) OF THE DEFENCES

37. Amongst the alleged defining characteristics of Bitcoin is the allegation that 'The Bitcoin System implemented all of the concepts described in the White Paper'. This allegation is already disputed in Paragraph 64(a) of the Defences. The amendment sought is to add an example which the Ds wish to allege shows this allegation is not correct. To understand the point, one also needs to understand that the Ds say that one of the key concepts in the White Paper is the '*non-reversible'* nature of Bitcoin transactions. The proposed amendment is shown underlined below—

> '64. If and to the extent that it is the Claimants' case that the BSV System has the Alleged Bitcoin Characteristics, then the same is denied. In particular, and without prejudice to the generality of the foregoing:
>
> (a) The BSV System does not implement all of the concepts described in the White Paper (contrary to paragraph 17(i)(b) PoC). <u>For example, the BSV System now includes a confiscation</u>

> transaction protocol which allows for a transfer of BSV without using the private key(s) that would previously have been required to authorise any transfer of said BSV. This protocol thereby allows for the reversal of BSV transactions.
>
> (b) The BSV System has changed previously implemented op-codes (contrary to paragrap7h 17(v) PoC).'

38. The Cs resist the introduction of the underlined text on two related bases. First, that this plea is unclear since it is based on a technical misunderstanding and second, it has no prospect of success. Both arguments are founded on a technical point about the nature of the confiscation transaction protocol. In his second witness statement, Dr Wright explained that Bitcoin (BSV) allows an owner of Bitcoin (BSV) to have a remedy where the owner has lost access to it or where freezing or seizure is required by law enforcement agencies. He explains that the feature does not allow for the "reversal" of Bitcoin (BSV) transactions. Indeed, the Cs say that a key aspect of the Bitcoin System is that blocks once embedded in the blockchain cannot be altered. Rather, the activity will be recorded on the Blockchain as an additional entry. Dr Wright notes that this is in line with the White Paper which refers to the "owner" and "owners" of Bitcoin, not possession.

39. In the evidence in support of the amendment, one of the Ds' solicitors says that Dr Wright "does not point to any place within the White Paper that discloses this novel procedure". The Cs say that is a complaint that there is something which is in the Bitcoin (BSV) system that is **not** in the White Paper, rather than something in the White Paper that is **not** in the Bitcoin (BSV) system which is the pleaded allegation. Further, they say it does not explain what this has to do with the Bitcoin Characteristics which is what paragraph 64 is about.

40. These exchanges show that the Cs understand the plea but, as I have indicated, their real point is that it is based on a technical misunderstanding. As for the second objection (i.e. the amendment has no real prospects of success), the Ds say the objection is bad as a matter or procedure and substance.

41. The Ds' procedural point is that whether it is necessary to show that a proposed amendment has a "real prospect of success" depends on whether the amendment is to introduce a new claim or alternatively provide further particulars, based on factual material, in support of an existing pleaded point. They say that whilst the former does need to meet the test, the latter does not as Roth J explained in *Phones 4U Limited v EE Limited* [2021] EWHC 2816 (Ch) at [11]:

> '…a contested amendment which seeks to introduce a new basis of claim or ground of defence into the proceedings, for example a new allegation that there was an implied term in a contract, will not be allowed if the party seeking to amend has no real prospect of success upon it. It would be pointless to allow the amendment if the other party could then obtain summary judgment against that head of claim or that ground of defence or that issue. All that is very different from an application to amend by giving further particulars based on

> factual material in support of an existing plea. In my judgment, the court should not, on such an application, conduct an assessment of whether each of the various particulars which it is sought to introduce have a real prospect of supporting that plea. Those are matters for trial.'

42. The Ds say that this amendment falls within the latter category and so the "real prospects of success" test does not apply.

43. As a matter of substance, even if the 'real prospect of success' test does apply, the Ds say that I cannot determine the technical issue without the benefit of a full understanding of all relevant technical matters derived from independent expert assistance.

Discussion

44. It seems to me that the underlying issue depends on the level of generality at which one considers 'reversibility'. I have a strong suspicion that Dr Wright's technical explanation will turn out to be correct but I do not consider I should decide this point on this application. I will therefore allow the Ds to make the amendment (for what it is worth) but with one alteration. It is clear that the plea in paragraph 64(a) of the Defence will be the subject of expert evidence. It follows, in my view, that any respects in which it is said the Bitcoin system does not implement the concepts in the White Paper must be specifically pleaded. It is not sufficient to say this is just an example and to leave any other points unsaid. Accordingly, I allow the proposed amendment but with the words 'Hereunder the Defendants rely on the following. The' in place of 'For example, the'. If the Ds have other examples, they will have to propose a further amendment.

SECURITY FOR COSTS

Introduction

45. Each set of Defendants seeks security for costs in the following amounts (and I should point out that each figure is said to be 70% of the total relevant incurred or estimated costs):

    i) The Coinbase Defendants seek security in the sum of £339k if their action is stayed, but if not, then security for their full costs of the action estimated at £3.2m.

    ii) The Kraken Defendants seek security of £205k, and if their action is not stayed, then security for their full costs of the action estimated at £2.7m.

46. In both actions, security is sought against C2.

47. The gateway provisions relied upon by both Defendants are CPR 25.13(2)(a) (the non-residence condition), and/or (c) (the impecuniosity condition). In addition, the Kraken Defendants rely on the gateway in (g) (the enforcement avoidance condition) and/or CPR 3.1(5) on the basis the Claimants failed to comply with the relevant pre-action protocol without good reason.

48. For their part, the Cs say that C2, despite being incorporated in the Seychelles, is resident in the UK and able to meet any adverse costs orders, having substantial current assets. In the alternative, Dr Wright is said to have sufficient assets to meet any adverse costs orders. Further, the Cs say that no security should be ordered on discretionary grounds (i.e. even if one or more of the gateway conditions are satisfied) since the Cs' primary case is that all the relevant goodwill is owned by Dr Wright, and C2 has only been included to support a secondary case: see paragraph 16 of the Particulars of Claim (where C2 is referred to as WII) which says as follows:

> '16. During the period of 2009 – 2016, Dr Wright set up, owned and controlled various trading entities, including WII, to develop his ideas for blockchain technology. WII was involved with the technical development of the Bitcoin System. nCrypt/nChain was assigned the software, code and financial modelling systems for the Bitcoin System by Dr Wright and those discrete aspects have been further developed by nChain. Dr Wright has remained, at all relevant times, the party responsible for the Bitcoin System, which includes the Bitcoin Characteristics as defined below, and the over-arching development and exploitation of the Bitcoin System. He, whether through his pseudonym Satoshi Nakamoto or otherwise, was the party relevant members of the public and trade identified with the Bitcoin System. The Claimants' case is that goodwill generated in the Bitcoin System with the Bitcoin Characteristics is owned by Dr Wright, but Dr Wright acknowledges that it may be owned, at least in part by WII. WII is included in this claim accordingly as an alternative to Dr Wright's primary case.'

49. On this basis, the Cs say that the addition of C2 adds nothing to the costs of the action, therefore there is no reason to order security against it.

50. Yet further, the Cs say that if the passing off actions are stayed (as the Ds propose) there will be no future costs incurred until after the resolution of the COPA claim, so security should be revisited at that point.

51. Finally, by way of introduction, the Ds highlight what they say is a striking feature of the Cs' defence to this application. Security was first raised last year (August 2022 by Coinbase and November by Kraken), yet the first time that the Cs adduced any evidence of financial means was on 1 May 2023 when they served their evidence for this first CMC. The Ds are highly critical of the Cs' evidence and I have to assess various points below.

Applicable principles

52. These were not in dispute and I need not discuss the well-known principles applicable to the main gateways relied upon. It is useful nonetheless to remind myself of the explanation given by Nugee LJ in *Infinity Distribution Ltd v The Khan Partnership LLP* [2021] EWCA Civ 564 at [30]-[31]:

> '[30] The preconditions or gateways in r 25.13(2) are not questions for the Court's discretion: they are matters of fact on which the Court needs to be satisfied, such as where the claimant is resident, whether there is reason to believe that the claimant company will be unable to pay the defendant's costs if ordered to do so, whether the claimant has changed his address with a view to evading the consequences of the litigation, and so on. But once the case has passed through one of the gateways, the other matters are all matters for the Court's discretion.
>
> [31] By r 25.13(1)(a) the Court is expressly required to have regard to "all the circumstances of the case" when deciding to make an order for security. There is a question on the wording of the rules whether this requirement expressly applies only to the issue whether it is a suitable case for making an order in principle, or whether it also applies to what I have called the details – the amount of security, and the manner and time in which it is to be provided. I think the answer is probably the latter, although I do not think that anything turns on it. The reason I take this view is because the overall question under r 25.13(1)(a) is whether it is "just to make such an order"; "such an order" is a reference back to the words "an order for security for costs under rule 25.12" in r 25.13(1); and an order for security for costs under r 25.12 will not only provide that security be given but also in what amount, by what means, and by when it is to be provided. It follows in my view that when r 25.13(1)(a) requires the Court to have regard to all the circumstances of the case in deciding whether it is just to make such an order, this encompasses all the aspects of the order that it is suggested it should make, including the manner in which security is to be provided.'

53. I should also discuss the principles applicable to a situation where there are two claimants but only one of them can be ordered to provide security. The Ds submitted as follows:

> 'The starting point is that the First Claimant's presence as a co-claimant does not as a matter of law deprive the Court of the power to order security against the Second Claimant which it would otherwise order. An example of a case in which the corporate (non-resident) claimant was ordered to provide security notwithstanding the presence of a (wealthy) individual co-claimant is *Tchenguiz v SFO* [2014] EWHC 1103 (Comm). It does not appear from the security for costs judgment, but the individual claimant RT was resident in England: *Rawlinson & Hunter v ITG* [2015] EWHC 1664 (Ch) para 14.
>
> Where there are two claimants (C1 and C2), only one of whom (C2) can be ordered to provide security, the legal position properly to be distilled from the authorities is as follows:

> (i) the starting point is to ask whether C2 should, if it were the only claimant, have to pay security. If not, that is the end of the enquiry. If so, the enquiry proceeds.
>
> (ii) the fact that security cannot be ordered against C1 is relevant to the exercise of the discretion whether to order security against C2, but does not in itself dispose of the need for security; see *Pearson v Naydler* [1977] 1 WLR 899 at 904H-905E; *Kimpton v Ferox* [2013] IEHC 577 at para 22(a); *Holyoake v Candy* [2016] EWHC 3065 (Ch) at *§*57.
>
> (iii) usually, it will only be a good reason to refuse an order for security if C1 is a "good mark" for the costs order: see *Holyoake v Candy* [2016] 6 Costs LR 1157 at §§57 and 67; *Primafacio Limited v Tres Canopia Limited* [2023] EWHC 430 (Comm) at §31. On that inquiry, C2 bears the burden of proof. See *Holyoake v Candy* [2016] EWHC 3065 (Ch) at *§*57 where this was accepted by the parties.
>
> (iv) C1 will be a "good mark" for costs against C2 where C1 would be jointly liable with C2 to pay the costs of C2 and where C2 has shown that C1 would be able to do so: *Holyoake v Candy* [2016] EWHC 3065 (Ch) at *§*57.
>
> (v) if C2 cannot show that C1 is a good mark for all of the costs that may be ordered against it (C2), then the defendant will be entitled to the usual remedies (security, failing which a stay) against C2; and
>
> (vi) ultimately, the question is one of discretion, seeking to do justice in all the circumstances, and balancing the interests of the parties.
>
> The authorities which have addressed this point do not alter the separate legal principle that in considering whether a party will be able to meet any costs order which may be made in due course, the question is whether it will have sufficient liquid assets to meet the costs order within the usual time period (say 14 days).

54. On the facts here, the Ds contended that certain other more detailed principles were relevant:

    i) First, the question as to whether C2 is able to meet a costs order falls to be determined on the evidence available, on the wording of the rule, as at the date when such an order may be made, and the question is whether the Second Claimant will have the means to meet a costs order in the time frame normally permitted for doing so (i.e. 14, 21 or 28 days).

    ii) Illiquid assets are not a good answer to an application, relying on *Ontulmus v Collett* [2014] EWHC 294 (QB) paras 46-47; *Longstaff v Baker & McKenzie*

[2004] 1 WLR 2917 para 17; *In re Unisoft Group Ltd (No 2)* [1993] BCLC 532.

iii) The test under condition (c) is also "reason to believe" and not on the balance of probabilities. See *Jirehouse Capital v Beller* [2008] EWCA Civ 908.

iv) Where a foreign company is reticent in revealing its financial position it is "sound" practice to grant security against it: *Sarpd Oil v Addax* [2016] EWCA Civ 120, recently cited in *Tulip Trading Limited (a Seychelles company) v Bitcoin Association for BSV* [2022] EWHC 2 (Ch) (Master Clark).

55. I accept all these submissions which are fully supported by the authorities cited.

The Ds' contentions on security and the Cs' responses

56. It is convenient to start with some evidence which the Kraken Ds adduced in support of the enforcement avoidance condition, relying on some statements allegedly made by Dr Wright on social media:

i) The First Claimant has in blog posts said that he has intentionally structured his assets to be held using a number of companies including the Second Claimant and the Tulip Trust in jurisdictions such as the Seychelles and that at one point when he was "*unable to keep paying lawyers, auditors and accountants"* he intentionally "*started moving assets back into Tulip Trading and other companies"*.

ii) The First Claimant has also stated, via his Slack Channel, that "*I've made myself untouchable. If you bankrupt me, nothing happens. I keep leading and I keep building because nothing is in my name. That is the purpose of the trust"*.

57. Furthermore, the Ds point to inconsistent testimony which Dr Wright has given about the Tulip Trust:

i) In his second witness statement for this application, Dr Wright says the Tulip Trust is a trust of which he is a beneficiary and in respect of which his wife is trustee.

ii) In the Kleiman v Wright proceedings in the US, Dr Wright claimed that he is the trustee and the Second Claimant and Tulip Trading Limited are the beneficiaries. The Judge found Dr Wright to have given false testimony about the Tulip Trust and the evidence was found not to substantiate the trust's existence.

58. The Ds do not accept that the Trust exists or exists in the form alleged by Dr Wright. In any event, they say Dr Wright's own statements make it clear that the Cs have deliberately used a trust and other vehicles to move assets around to avoid enforcement and will continue to do so.

59. All of this evidence (which was not really disputed) casts a shadow over a number of the issues I have to consider.

60. A considerable quantity of evidence was filed to address all the issues indicated in this introductory summary set out above. However, as I indicate below, it is not necessary to discuss all the evidence in detail because, with the applicable principles in mind, I came to a clear conclusion that orders for the provision of *some* security were warranted. This conclusion is based on the following points.

61. The first point is that I was not satisfied by the evidence from the Cs filed in support of the contention that C2 was resident in the UK. The Ds submitted that the Cs had failed to provide the necessary information to enable the Court properly to scrutinise the Second Claimant's course of business and trading. In these circumstances, all that the Court can go on is the Second Claimant's place of incorporation and location of its registered office and registered agent, all of which are in the Seychelles. Accordingly, in the Defendants' submission the only conclusion that the Court can draw is that the Second Claimant is ordinarily resident in the Seychelles.

62. The Cs relied on three matters in support of the claim that C2 was resident in the UK. First, matters concerning Dr Wright's home office in the UK. Second, C2's registration under the International Business Companies Act 2016 ('the IBC Act"). Third, a comparison with the position of Tulip Trading Limited.

63. Dr Wright's evidence was to the effect that he works from a home office in the UK which "*contains computers which are dedicated to WII"* and that he carries out work "*in relation to WII's corporate activities from this office, including hosting board meetings"* and that "*WII's accounting and corporate books and records are kept at this office".* Other activities mentioned by Dr Wright are administrative functions and activities (hosting board meetings and storing of records) which do not necessarily involve management or control of the Second Claimant's business and trading.

64. As for the second point, a registration under the IBC Act tells one nothing about where the company is resident.

65. The third point carries no weight at all. C2 was compared to Tulip Trading Ltd, which was found to be resident in the UK in *Tulip Trading Ltd v Bitcoin Association for BSV* [2022] EWHC 2 (Ch). However, as the Ds submitted, in that action, Dr Wright gave evidence that he was the CEO and beneficial owner of Tulip Trading Ltd and controlled its assets (Bitcoin) using keys from his home office. The contrast with the evidence as regards C2 is striking.

66. Second, the evidence established that there are significant obstacles to enforcement of any order for costs against C2 in the Seychelles. Mr Cordell for the Coinbase Defendants explained that the likely legal costs of an English costs order in the Seychelles range between US$25-30K if the enforcement does not require a significant court case, taking between 12-24 months. Ms Mountain for the Kraken Ds points out that there may well be difficulties with the fact that C2's assets are holdings in BTC, BCH and BSV. She said the judiciary in the Seychelles has no practical experience in cases involving cryptocurrencies and digital assets are not yet recognised as property under Seychelles law.

67. Third, there is the issue of C2's impecuniosity. On this issue, the Ds relied on the principles set out in paragraph above.

68. The Cs relied on the evidence set out in the first witness statement of Mr Chesher (Chesher 1). He says C2 has assets worth US$16.5 billion comprising intellectual property and BTC, BCH and BSV. The Ds say there are a number of serious problems with this evidence.

69. First, the Ds say Mr Chesher's evidence is inadmissible. In summary, they contend as follows (and it should be noted these sub-paragraphs contain the Ds' contentions):

    i) Chesher 1 comprises inadmissible opinion evidence which could only be provided by an expert report, for which the Cs have not sought permission.

    ii) Permission would not be granted for Chesher 1 for numerous reasons including: he is not independent, having worked with Dr Wright 'over the years'. The Ds found that Mr Chesher acted as a representative of Dr Wright in a 2014 tax investigation into his tax affairs by the Australian Tax Office (the ATO). Ms Mountain's evidence showed that various documents provided in that investigation, including documents provided by Mr Chesher, were found by the ATO to be a "*nullity based on a sham."*

    iii) Furthermore, although Mr Chesher claims to be a "*public accountant, financial consultant, and cash-flow specialist"* and asserts that he has worked as a "*public accountant and bookkeeper in Australia"* for the last 20 years and prior to that held roles at various Australian corporations, no further details of these qualifications or positions or *curriculum vitae* has been provided. "Public Accountant" is not a term used in Australia. A "qualified accountant" in Australia is one who is a member of CPA Australia, Chartered Accountants Australia and New Zealand, the Institute of Public Accountants or an eligible foreign body. Mr Chesher does not allege he meets these requirements. There is also no suggestion in Mr Cheshire's LinkedIn profile that he has ever worked or qualified as an accountant. In fact, Mr Chesher's LinkedIn profile omits any description of him being an accountant, and there he describes himself only as a "*financial consultant and cashflow specialist*". That profile also shows that Mr Chesher ceased working in 2017 and has not worked since. Mr Chesher also does not appear to hold any relevant qualifications as a company auditor.

    iv) Mr Chesher provides no evidence that he has ever undertaken a previous valuation of assets or that he has any experience in Seychelles companies. He also does not claim to have any expertise in the analysis and valuation of digital assets such as BTC, BCH and BSV.

    v) He lacks any relevant qualifications or experience to provide the opinion evidence he purports to give. He is also not subject to the safeguards in CPR Pt 35 and the accompanying practice direction and has not, for example, clearly set out the details of all literature and other material he has relied upon or the tests he has performed. For example, he refers vaguely in his statement to having "*sighted bitcoin addresses*" and having "*randomly tested various addresses*" with no information given as to what those addresses were or how he tested them (and he does not give any evidence to suggest that he has the technical expertise necessary to conduct such tests). He also claims to have

relied on the Second Claimant's accounting records to produce the "Ledger Account" annexed to his statement and yet has not disclosed those records.

70. Second, the Ds say that even if Mr Chesher's evidence is not inadmissible, it should be given no weight since it contains numerous flaws and is demonstratively unreliable, for the following reasons (again, the Ds' contentions):

i) He provides evidence about transactions about which he cannot have any personal knowledge, since he is not C2's accountant, without explaining the source of his information, a topic on which he is silent.

ii) The 'asset calculations' in his first exhibit is unsigned, unaudited and lacks any explanatory notes. In circumstances where the Second Claimant is a Seychelles company and so not obliged to file audited accounts the Ds contend that one would have expected a proper explanation of how the document was put together and how reliable it is.

iii) His 'asset calculations' rely almost entirely on valuations of BTC, BCH and BSV. No addresses or proof of ownership of these assets or access to the relevant private keys (which are necessary in order that they be accessed) was provided with Mr Chesher's statement or elsewhere in the evidence. The Ds contended that proof that the Cs have access to these assets is essential, particularly given that (a) in other proceedings Dr Wright has admitted he does not have control or access to some of the Bitcoin addresses he purports to hold and (b) Dr Wright's claims to own and/or control various Bitcoin addresses have had serious and credible doubt cast on them in other proceedings.

iv) The 16,404 blocks of BTC relied upon in Mr Chesher's calculations are apparently the same BTC relied upon in the Kleiman v Wright proceedings. Some of that BTC belongs to Satoshi Nakamoto. If the Claimants do not win these proceedings, they will have no basis on which to lay any claim to such assets. The Defendants also do not accept that the Claimants or either of them own those assets: in the seven years since the First Claimant first publicly claimed to be Satoshi Nakamoto he has failed (despite many requests) to produce any evidence that he has been able to identify let alone access the BTC belonging to Satoshi Nakamoto.

v) In the Kleiman v Wright proceedings the First Claimant provided a list of the addresses for its alleged BTC blocks (the "Kleiman List"). The Kleiman List has been demonstrated to be false or, at best, highly dubious as explained in Ms Mountain's evidence. Further, Dr Wright has, in his various litigations, provided inconsistent evidence as to who purports to own and control the BTC associated with the addresses in the Kleiman List. In the Kleiman v Wright proceedings Dr Wright said that that BTC is owned by the Tulip Trust. Dr Wright's second witness statement suggests that Dr Wright personally lays claim to that BTC. It is therefore not at all clear whether the alleged BTC is owned by the Tulip Trust, Dr Wright, C2 or other persons.

vi) Mr Chesher's asset calculations contain discrepancies. Namely, there are no spends or transfers of BTC since 2012 yet there have been spends from multiple addresses listed on the Kleiman List since 2018. Mr Chesher also

states that the total number of BTC held by the Second Claimant is 819,818 but 16,404 sets of 50 BTC are listed. 16,404 sets of 50 BTC should equal 830,200 BTC.

vii) Aside from BTC, BCH and BSV, the only other assets allegedly owned by the Second Claimant and included in the valuation are alleged intellectual property in the Bitcoin software and database which have been given a valuation of USD 250,000. However, the ATO previously valued the research underlying these same alleged assets at nil during its 2009 audit.

viii) There are good reasons to doubt the authenticity of the purchase order at page 7 of Exhibit JC1 regarding the transfer of 80,000 BTC to Tulip Trading Limited in 2012. This document has previously been challenged in litigation. It was annexed to the Particulars of Claim in *Tulip Trading Limited v Bitcoin Association for BSV* (Case No. BL-2021-000313 ("Tulip Trading*"*). The First Claimant is the CEO of Tulip Trading Limited. The Second to Twelfth Defendants in Tulip Trading have in their Defence pointed out various inconsistencies in the Order and also noted it is based on a free online template which was not released until 4 years after the alleged purchase took place. In fact, it does not appear that 80,000 BTC can have been moved to Tulip Trading Limited in 2012: in the Tulip Trading Claim the First Claimant's own solicitors acknowledged that Tulip Trading Limited was only purchased by C1 in 2014.

ix) Chesher 1 relies on the premise that the Second Claimant was linked to the First Claimant as at 2009, when the Second Claimant's accounting records commence. In fact, it appears the Second Claimant was purchased by the First Claimant in October 2014.

x) Mr Chesher records the Second Claimant has having no liabilities nor obligations. Yet as noted in Mr Cordell's witness statements, there is a Charge dated 10 August 2021 in favour of Sundial Spacesuits Inc in relation to which certain assets held by the Second Claimant are secured under a lending agreement.

71. Other difficulties with the Cs evidence asserted by the Ds are that:

i) the Court in the Tulip Trading Claim held that cryptocurrencies are not suitable as security owing to the high level of volatility of such assets. See *Tulip Trading Limited v Bitcoin Association* [2022] EWHC 141 (Ch) §§43 – 45.

ii) the assets are not liquid assets and no information is given as to how quickly funds could be obtained by the Second Claimant in relation to them.

iii) Dr Wright chose to register C2 in the Seychelles were no audited accounts need to be filed.

72. In these circumstances, the Ds submitted that one would expect to see clear, unambiguous and transparent evidence from an identified and reliable source that it could meet any costs award ordered (relying on *Primafacio Limited v Tres Canopia*

Limited, Euroenergy Investments Corporation [2023] EWHC 430 (Comm) per Sir Nigel Teare at §39 in the context of discussing the evidence that would be required to show that a BVI company was a "good mark" for costs ordered against another Defendant), and particularly so in circumstances where the First Claimant's credibility and veracity are in question in these proceedings and where Courts here and in other jurisdictions have made findings that the evidence the First Claimant has given in those proceedings is "*implausible*" and "*false*". Instead, the evidence that has been provided is far from independent, is wholly unreliable and not at all clear.

73. Accordingly, the Ds submitted there is reason to believe that C2 will be unable to meet any adverse costs order following a trial. Alternatively, the lack of specificity in the evidence indicates that C2 is reticent in revealing its financial position so it is "sound" practice to grant security against it.

74. Fifth, the Ds contend that Dr Wright is not a 'good mark' for all the costs which may be ordered against C2. On this point, the Ds accept that here there is a community of interests between the Claimants but they say that should a costs order be made the Defendants have very good reason to believe that the First Claimant would be unable to pay it.

75. The Ds rely on the following main points (and I emphasise all these sub-paragraphs constitute the Ds' submissions):

    i) First, they say it appears Dr Wright is reliant on funding of some sort to pursue these claims. While he states that "*nobody is providing me with 'litigation funding'"* he goes on to admit that Mr Ayre's companies have provided some debt and venture financing in some of his businesses. That Mr Ayre seems to be providing funding for these claims appears to be confirmed in the evidence from Dr Wright's solicitor, Ms Keane, when she states that "*Dr Wright explains that Mr Calvin Ayre is not providing litigation funding of the claims in a traditional sense, but that companies related to him have invested in various businesses of Dr Wright by way of debt and venture funding*" (emphasis added). The Ds say the implication therefore is that Dr Wright does not have sufficient funds to himself fund this litigation.

    ii) Second, they point to Dr Wright's own evidence where he says that he has "*assets available … to meet any adverse costs order*". The Ds say it appears these assets are wholly or largely the Bitcoin attributable to Satoshi Nakamoto. No independent, audited balance sheet has been provided for the First Claimant or any credible evidence provided that he has ready access to any, let alone sufficient, liquid assets to meet a costs order.

    iii) Third, they point to Dr Wright's evidence that he has met adverse costs orders and there are no adverse costs orders in this jurisdiction that have not been satisfied. The Ds evidence suggests that he has not satisfied an adverse costs order against him in Kleiman v Wright and there is also an outstanding Norwegian costs order against him in the Granath proceedings there. Dr Wright disputes that these orders are outstanding or unmet. However, the Ds also point to the large number of different proceedings in different jurisdictions in which Dr Wright is currently engaged. In addition they point out that in McCormack v Wright the litigation was funded by way of a BSV

denominated loan from Mr Ayre secured against the First Claimant's personal Bitcoin holdings. The Ds say it is not known whether that loan has been repaid and whether C1's Bitcoin holdings are still subject to a charge.

iv) Fourth, the Ds found some evidence of C1's financial position by way of a sworn financial statement setting out details of his assets which was provided to the Florida Court in Kleiman v Wright. Dr Wright failed to pay a judgment debt entered against him in the sum of $143,132,492 and, in a debtor fact information form dated 30 March 2023 said that he did not hold any assets whatsoever in his own name and has not held any assets in his own name since 2017. The financial statement was sworn before a partner in Ontier's London dispute resolution team. In these circumstances the Ds do not understand therefore how Dr Wright or his solicitors can assert that Dr Wright has sufficient funds to pay any costs order.

v) Fifth, in response to Dr Wright's evidence that he is a beneficiary of the Tulip Trust, the Ds say they have real doubts as to the existence of this trust for the reasons summarised above, but in any event they say the evidence in this regard is entirely unsatisfactory. He provides no information as to the assets of the trust (their value or nature) or how readily they might be accessed. It is apparent from the First Claimant's evidence that he can only access such assets with the authorisation of his wife (Ms Ang). Yet no witness statement has been provided from Ms Ang confirming that she would be willing to provide such authorisation if required to do so. Even if such witness statement had been provided, there is no evidence before the Court that there would be no bar to Ms Ang providing the trust's assets to the First Claimant in order to meet a costs order in these proceedings.

76. Accordingly, the Ds say that the Cs have failed to demonstrate that the First Claimant is a good mark for any costs order and that it is just in all the circumstances to order security.

Interim Conclusion on whether security should be ordered in principle

77. I can state my interim conclusion succinctly. Although the Ds' contentions about the status of Mr Chesher's evidence have considerable force (i.e. he is not a suitably qualified expert, no permission for expert evidence obtained), it is unnecessary to rule formally on them. Taking the most favourable view of that evidence for the Cs, in all the circumstances it does not persuade me that either C2 or C1 has substantial liquid assets which would be readily available to meet the substantial costs liabilities which might arise in these two actions, whether those costs liabilities are the costs so far incurred by each set of defendants, or the potential costs liability at the conclusion of each action. So these are cases in which the Ds have established a prima facie need for security to be given.

78. To explain in a little more detail:

i) First, I was not satisfied that C2 is resident in the UK or that (assuming such residence) it has any degree of permanence. The nature of whatever business C2 has conducted or does conduct was also obscure.

ii) Second, C2 was included as a claimant in these actions for a reason. It is not possible to conclude that its presence is unnecessary in advance of trial. As a joint claimant, C2 will be jointly and severally liable for costs ordered against the Cs.

iii) Although the Cs submitted (in their attempts to downplay the significance of the problems with Mr Chesher's evidence) that '*The fact of 819,818 BTC having substantial value is just that, a fact (of which the Court can take judicial notice, if need be), as opposed to [being] subject matter requiring expert evidence of precise value',* in my view, and perhaps most importantly, the evidence overall presents a remarkably obscure picture as to which person or entity on the Cs' side owns precisely which Bitcoin assets to which Dr Wright has ready access. In particular, it was not made clear which Bitcoin mentioned in Cs evidence might or might not be the subject of the claim in the *Tulip Trading* case. That very obscure picture, along with the statements made by Dr Wright to which I referred at [56] and the other points in [57]-[58] & [75] above, provides no reassurance that either C2 or C1 has or will have funds to pay costs.

iv) Even if I had been persuaded that either C2 or C1 owned unencumbered Bitcoin assets from which substantial value could readily be realised, I retain a discretion as to the manner in which security should be ordered. For the applicable principles, I can borrow [37]-[38] from the judgment of Master Clark in *Tulip Trading Ltd v Bitcoin Association for BVS* [2022] EWHC 141 (Ch), which read as follows:

> '37. The principles applicable to the court's discretion as the manner of security are set out by Popplewell J (as he was) in *Monde Petroleum SA v Westernzagros Ltd* [2015] EWHC 67 (Comm); [2015] 1 Lloyd's Rep. 330 at [61]:
>
> "It is conventional to order security to be given either by payment into Court or by the provision of a guarantee from a first class London bank. That practice recognises that the security should be in a form which enables the defendant to recover a costs award made in its favour at the trial from funds which are readily available, such that there is little risk of delay or default in enforcement. Although security may be ordered in an alternative form, that form should be such as to fulfil the same function, so as to allow simple and swift enforcement of a costs order from a creditworthy source. In practice any such alternative form of security must be such as can properly be regarded in these respects as at least equal to, if not better than, security by payment into Court or provision of a first class London bank guarantee. See *Belco Trading Co. v Condo* [2008] EWCA Civ 205 at paragraphs [6] to [9] and *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2013] EWHC 658 (Comm) at paragraph [10]."
>
> 38. More recently, in *Infinity Distribution Ltd (in administration) v Khan Partnership LLP* [2021] EWCA Civ

> 565, the Court of Appeal set out the principles to be applied in determining the form of security to order when the claimant proposes an alternative form of security that is not the usual payment into court:
>
> (1) In exercising its discretion to make an order for security under CPR 25.12 and 25.13(1)(a), a court should have regard to all the relevant circumstances: [32].
>
> (2) When exercising any power given to it under the rules, including under CPR 25.12 and 25.13(1), a court is obliged by CPR 1.2(a) to seek to give effect to the overriding objective, which, by CPR 1.1(2), includes, so far as practicable, ensuring that the parties are on an equal footing and ensuring that the matter is dealt with fairly: [33].
>
> (3) The task of the court is to "weigh up the respective pros and cons and strike a fair balance between the interests of the parties", and this balancing of pros and cons "is likely to be the primary consideration": [34] – see also [35].
>
> (4) If, on an application for security, two different forms of security would provide equal protection to the defendant, the court should, **all else being equal**, order the form which is least onerous to the claimant (emphasis added): [45].'

v) Applying those principles, and very largely in accordance with the reasoning of Master Clark at [43]-[44], even if I had been satisfied that either C2 or C1 owned unencumbered Bitcoin assets, I would have declined to order that security could be provided by way of digital assets. I recognise that these Ds would be far better placed than most to be able to realise value from digital assets. However, the basic message I discern from the authorities is that if there is any difficulty predicted or foreseen in raising funds using digital assets by way of security or guarantee, those difficulties should be tackled by the person or entity who or which is required to provide security (and at the time of the provision of security) and not by the beneficiary of such security, particularly when the value of the digital assets is recognised to be highly volatile.

The amount and manner of security

79. I now have to consider what sums to order by way of security taking into account 'all the circumstances of the case'. I have found this topic somewhat difficult, largely due to the substantial security already ordered in Dr Wright's favour in the COPA claim.

80. It seems to me that the present situation has some parallels with a 'Crabtree' type case. The notes in the White Book identify the principle (at 25.13.2) as:

> 'The court may, in its discretion, refuse to order security for costs in respect of a claim where the same issues arise on a counterclaim in the same proceedings (*BJ Crabtree*

> *(Insulation) Ltd v GPT Communications Systems (1990) 59 B.L.R. 43, CA*).'

81. It is clear that the principle does not apply merely because there is a claim and counterclaim – it is necessary to assess whether the counterclaim is merely or largely the defence to the claim or whether it has an independent vitality of its own: see e.g. *Dawnus Sierra Leone Ltd v Timis Mining Corp Ltd [2016] EWCA Civ 1066*, a case which is accurately summarised in the notes to the White Book as follows:

> 'Where a claim and counterclaim both have independent vitality and each side can establish grounds for security against the other, the court will normally make orders for security against both sides or neither side.' … 'In *Dawnus*, the Court of Appeal held that both sides were commercially experienced entities claiming similar sums and both were impecunious and the defendant had already commenced proceedings on its cross-claim overseas; in those circumstances the proper order to make was that neither side should give security.'

82. Certainly these two passing off cases have a vitality which is independent of the COPA claim, at least in certain respects. Nonetheless, the claims are closely linked by the common identity issue. If Dr Wright wins that issue, then these actions will continue. If he loses that issue, it is highly likely that puts an end to these actions.

83. However, it seems to me that the fact that substantial security has been ordered in Dr Wright's favour provides no obstacle to an order for security against him in these two passing off actions. After all, the situation which the court had to consider in the COPA action was whether, in the event that COPA lost, it would be able to pay Dr Wright's costs. The situation I have to consider is whether, in the event that Dr Wright loses the COPA trial, whether the Cs in these actions would be able to pay the Ds costs. I have already concluded they would not or at least there exists a considerable risk that they would not. Furthermore, in these passing off actions, the Cs are the aggressor and the issue of these two actions was their voluntary act whereas for the Ds, being sued was not.

84. I proceed on the basis that these actions will be stayed pending the outcome of the COPA claim (for reasons explained in my related judgment from the second CMC), in which circumstance the Coinbase Ds seek £339k and the Kraken Ds £205k by way of security. These costs have already been incurred.

85. These costs (and the estimated costs which will be incurred by the Ds in these actions as a whole) are very high. Furthermore, I note that the hourly rates charged by the solicitors acting for the Coinbase Ds are very significantly above the guideline rates.

86. I entirely accept that both actions involve novel and difficult issues, which entirely justify the Ds instructing specialist IP solicitors and counsel. One novel and difficult issue is whether it was Dr Wright who adopted the pseudonym *Satoshi Nakamoto* and was the person responsible for establishing the Bitcoin System and the alleged Bitcoin Characteristics, but that issue will be decided in the COPA action. Even if Dr Wright succeeds on that 'identity issue', there remain difficult issues with the remainder of these passing off actions.

87. The Ds in these actions have different solicitors to those acting for COPA in the COPA claim, even though those solicitors are also a highly experienced IP firm. I have considered whether there has been an element of duplication between the Ds' costs of these two passing off cases and the conduct of COPA's claim. After all, the identity issue is the sole issue in effect in the COPA claim, so much of the case against Dr Wright had been explored in some detail by the time these Ds had to plead their defences to these passing off claims. My provisional conclusion is that there has been some duplication but the extent of its effect on costs cannot be determined.

Conclusion on security

88. In all the circumstances, I have reached the conclusion that C2 must provide security by way of payment into court or a guarantee from a first-class UK bank in the following amounts:

    i) In respect of the Coinbase Ds, in the sum of £250,000.

    ii) In respect of the Kraken Ds, in the sum of £150,000.

89. In ordering security I am comforted by the related facts that, on the evidence, (a) there is no prospect of these claims being stifled and (b) the Cs ought to have no difficulty in putting up security in these amounts if there is any truth in their evidence. Alternatively, if the Cs are being assisted in funding these actions, those standing behind the Cs must assist in putting security in place.

90. I recognise that it may take a little time to arrange security, so I propose to order that security must be put in place within 28 days of the hand down of this Judgment. If the Cs encounter particular difficulty, then they may apply to me for extra time but they should not assume it will be ordered. The Cs have been on notice for many months that these Ds were seeking security for costs. If any additional time is to be granted, it will require specific evidence as to the efforts put into arranging security and why it has not been possible within the 28 day period.

91. If security is not put in place within the time specified, then these two passing off actions will stand struck out 7 days after the expiry of the time specified. I ask the parties to agree an Order giving effect to this Judgment.

92. The issues left over from this CMC will either have been decided in the Second CMC, or fallen away or will have to be restored for further hearing, if required.