Breaking cryptocurrency news in Tulip Trading Limited v Bitcoin Association for BSV and others [2022] EWHC 667 (Ch)

Tulip Trading Limited v Bitcoin Association for BSV and others [2022] EWHC 667 (Ch)

The High Court has summarily dismissed the highly-publicised multi-billion dollar claim brought against bitcoin software developers, which sought an order for changes to be made to the underlying software code and/or blockchains. It is the first case in the English Courts to consider the role and duties of cryptocurrency software developers.

In setting aside the original order for service out of the jurisdiction, Mrs Justice Falk held that the claim had no real prospect of success.

Matthew Thorne, instructed by O'Melveny & Myers, represented the successful defendants.

a. The Claim

The Claimant alleged that it owned some $4.5 billion of bitcoin on the BSV, BTC, BCH and BCH ABC networks, but that in February 2020 its computer was hacked and its private key had been erased. It was, it said, therefore no longer able to access its cryptocurrency.

It claimed that the Defendants were the core developers with control over the various networks; that they had the ability to write a patch to amend the underlying software in order to enable the Claimant to regain control over its bitcoin; and that they came under tortious and fiduciary duties which obliged them to do so.

Since none of the Defendants were within the jurisdiction of the English Courts, the Claimant required permission to serve proceedings on them out of the jurisdiction. In May 2021, the Claimant obtained permission to do so pursuant to CPR 6.36 and 6.37 on an *ex parte* basis.

The Defendants subsequently contested service out of the jurisdiction and sought to set aside the original order. The Court considered the question afresh by way of rehearing (following *Microsoft v Sony Europe* [2017] EWHC 374).

Principal amongst the challenges raised was that the claim had no real prospect of success. The Court agreed. With reference to *Altimo v Kyrgyz* [2011] UKPC 7 and *Vedanta v Lungowe* [2019] UKSC 20, the Court stated at [37] that:

> "*The claim must be more than merely arguable. Whilst the court must not conduct a mini-trial, it must take account of the available evidence and also evidence that can reasonably be expected to be available at trial. But there may be a point of law on which the court should "grasp the nettle". The court should not allow the case to proceed because something may turn up.*"

b. Fiduciary Duties

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As to the case based on fiduciary duties, the Court's starting point was the well-known judgment of Millett LJ in *Bristol and West v Mothew* [1998] Ch 1, which confirmed that:

> "*A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.*"

The Claimant submitted that the Defendants have complete power over the system through which the digital assets were held; that owners had entrusted the care of their property to the Defendants and were vulnerable to abuse; that the Defendants had power to amend the software including to allow owners to regain control over their assets; and that this gave rise to a fiduciary duty to do so.

In paragraphs 73 to 83, the Court considered the elements said to give rise to a fiduciary duty. It noted that:

- Whilst an imbalance of power and vulnerability to abuse was "*often a feature of fiduciary relationships*" it is "*not a defining characteristic and is certainly not a sufficient condition for the existence of the duty*". Moreover, bitcoin owners cannot realistically be described as "*entrusting their property to a fluctuating, and unidentified, body of developers of the software, at least in the sense and to the extent claimed*".
- The defining characteristic of a fiduciary relationship is the obligation of "*undivided loyalty*". It was a necessary part of the claim that the underlying relationship between the Defendants and bitcoin owners generally has a fiduciary quality. Yet the steps that the Claimant wanted the Defendants to take would be for its benefit alone, and not the benefit of other users. The change could in fact disadvantage other participants in the Networks.

c. Tortious duties

As to the case based on tortious duties, the Court confirmed that:

- In line with recent guidance of the Supreme Court, "*in identifying whether a duty of care exists, an incremental approach should be adopted, based on an analogy with established categories of liability*".
- The loss in this case was purely economic, as a result of which no common law duty of care can arise in the absence of a special relationship.
- The complaints made were of failures to act, yet "*there is no general duty to protect others from harm*", and "*the law generally imposes no duty of care to prevent third parties causing loss or damage, or for injury or damage caused by a third party*".

It went on to conclude that the existence of a special relationship to safeguard against pure economic loss was not arguable, and that it was also not arguable that the imposition of the alleged duties could be treated as an incremental extension of the law.

The alleged duties would be owed to an unknown and potentially unlimited class; there would be no real restriction on the number of claims that could be advanced against the Defendants by persons who had allegedly lost their private keys or had them stole; and the duty was of an open-ended scope since the Defendants "*would be obliged to investigate and address any claim that a person had lost their private keys or had them stolen*". Moreover, the Court noted that:

> "*developers are a fluctuating body of individuals. Even if the Defendants currently have control of the*

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Networks (as TTL asserts) it is hard to see how there is any basis for imposing an obligation which would require them to continue to be involved and make changes when required by owners, when they have given no previous commitment or assurance that they would do so and their previous involvement may well have been intermittent"

d. Change of Case

The Claimant attempted to circumvent its difficulties on the breadth of the obligation by a late change to its case. It suggested that, rather than investigating the claims themselves, developers would be entitled to require a Court Order confirming ownership before being required to act. It also suggested that they would be entitled to payment for their work in writing the software patch.

The Court also rejected these arguments, noting that the Particulars of Claim alleged an *existing* breach which was inconsistent with these new allegations. A change of case for jurisdiction purposes required the 'indulgence' of the Court (*Alliance Bank JSC v Aquanta* [2012] EWCA Civ 1588). This required a formal application (*Magdeev v Tsvetkov* [2019] EWCA Civ 1802) together with a copy of the statement of case with the proposed amendments (Practice Direction 17). No such application had been made, and the Claimant was accordingly not entitled to pursue its amended case.

In view of its findings that the claim had no real prospect of success, the Claimant failed at the first jurisdictional threshold. The order for service out of the jurisdiction was therefore to be set aside.

The full judgment is available here: https://www.bailii.org/ew/cases/EWHC/Ch/2022/667.pdf

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