Neutral Citation Number: [2023] EWHC 2437 (Ch)

Claim No. **BL-2021-000313**

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 4th October 2023

Before:

MR. JUSTICE MELLOR

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Between:
TULIP TRADING LIMITED

Claimant

and

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

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MR. BOBBY FRIEDMAN (instructed by Travers Smith LLP) appeared for the Claimant.

MR. SEBASTIAN ISAAC KC and MR. PHILIP AHLQUIST (instructed by Enyo Law LLP) appeared for the Second to Twelfth Defendants.

Hearing Date: 3rd October 2023

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APPROVED JUDGMENT

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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.
Once approved, 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 Wednesday 4th October 2023 at 10.00am.

THE HON MR JUSTICE MELLOR

MR JUSTICE MELLOR :

Introduction

1. The application before the Court raises, as Mr Friedman submitted, a point of principle as to the scope of a certain exception to the rule in *Hollington v Hewthorn* and the purpose of or justification for that exception.

The action

2. The Claimant, Tulip Trading Limited (TTL), is said to be the legal owner of certain digital assets including those which are the subject of the action. The ultimate beneficial owners of TTL are said to be Dr Craig Wright and certain members of his family.

3. The claim against the first defendant has been settled. The remaining defendants are all individuals who, at some point in time, have had involvement or continue to be involved in the development of various digital asset networks, specifically, the Bitcoin BTC network, the Bitcoin Cash network and the Bitcoin Cash ABC network. For that reason, they are referred to in this action as the Developers.

4. The Developers split into various groups. D2-D12 are represented as indicated in the heading. D15&D16 are separately represented, with Cooke, Young & Keidan LLP as their solicitors on the record. D14 has solicitors on the record, Brett Wilson LLP. As far as I am aware, D13 has not responded to the claim. As indicated in the heading, this application only concerned TTL and D2-D12.

5. TTL claims to be the owner of Bitcoin at two specific addresses which are said to be worth around £4.5bn ('the Addresses', identified in summary as 1Feex and 12ib7). Dr Wright says he/TTL are no longer able to access those digital assets because of a hack of his computer which he says took place in February 2020. TTL sues the Developers in an attempt to force them to write software which will enable TTL to recover its claimed digital assets. TTL claims that the Developers owe fiduciary and other duties which require them to assist TTL to recover its digital assets.

6. The CMC in this action is set for a hearing before me in the period of 13-17 November 2023. Scheduled for determination at that hearing are a number of applications, including two which seek the trial of a preliminary issue.

    i) For their part, D2-D12 will be asking the Court to order the trial of a preliminary issue:

> 'on the questions of whether TTL owns the Bitcoin in the Addresses (as defined in paragraph 29 of the Amended Particulars of Claim), whether the claim has been brought by TTL knowing that it does not own the Bitcoin in the Addresses, and whether the claim is advanced fraudulently by TTL such that it is an abuse of process'.

ii) By contrast, D15&D16 will be asking the Court to order a preliminary issue trial in respect of the following issues, namely:

> 1.1. In the absence of the Claimant having joined persons with competing claims to, and/or in view of the Defendants not claiming an interest in, the bitcoin in the 1Feex and 12ib7 addresses (both as defined in the Amended Particulars of Claim), can and/or should the Court determine whether the Claimant is the owner of that bitcoin; and
>
> 1.2. If the Court can and will determine that issue, did the Claimant own that bitcoin at the time of the alleged hack of Dr Craig Wright's computer systems by persons unknown in February 2020 (the "Ownership Issue")?

7. Thus it can be seen that both sets of defendants wish the Court to decide whether TTL owns the digital assets in question, but D2-D12 want the Court to go further and make findings as to abuse of process.

8. Having set out the background, I can now turn to the application for decision.

This Application

9. Following a directions battle which I heard on 15th August 2023, I appointed this hearing to determine an application by TTL to strike out certain paragraphs in the first witness statement of Mr Timothy Elliss which was made in support of D2-12's application for their preliminary issue.

10. I am now only concerned with section D of Mr Elliss' witness statement, some introductory sentences in §§7, 10 and 12 which seek to summarise the content of that section, and some later paragraphs. This material has been referred to as 'the Hollington Material' and was highlighted in yellow in a marked up copy of Mr Elliss' witness statement. The nature of the material can be illustrated by reference to section D which is entitled 'Dr Wright's history of fraud, forgery and dishonesty'.

11. In that section, Mr Elliss quotes from a number of judgments: one in New South Wales, 2 in the UK, and 1 in each of Florida & Norway. The quotes contain various adverse findings made by the judge in each set of proceedings about Dr Wright's evidence in each set of proceedings.

12. Having set out what are in D2-D12's view the best quotes, Mr Elliss concludes his section D with this:

> 'I accept that none of the findings in the above section are binding on the Court in these proceedings and that the Court will need to form its own view of Dr Wright and his evidence in due course. However, the fact that so many different judges in different jurisdictions have formed such a consistent view of Dr Wright's dishonesty and propensity for forgery and fabrication is

> damning and plainly relevant to the question of whether a Preliminary Issue Trial should be ordered.'

13. The issue for determination today is whether the rule in *Hollington v Hewthorn* precludes reliance on the Hollington Material in the application by D2-D12 for a preliminary issue. (D15&16 do not rely on this material). In other words, is Mr Elliss wrong when he submits that those findings are plainly relevant to the question of whether a Preliminary Issue Trial should be ordered.

14. Mr Friedman drew my attention to my recent judgment in *Wright v Coinbase Global Inc.* [2023] EWHC 1893 (Ch) where I struck out certain paragraphs in the defences which sought to plead many of the findings made by other judges in the proceedings which Mr Elliss deals with in his section D. However, as Mr Isaac submitted, my decision involved an orthodox application of the rule in *Hollington v Hewthorn* because the offending pleading sought to rely on those findings as admissible at trial. That is not the situation here. In that judgment, I cited the key passage from *Rogers v Hoyle* [2014] EWCA Civ 257 (per Christopher Clarke LJ (with whom Arden and Treacy LJJ agreed), which is worth repeating here:

> '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.'

15. Before coming to the substance of the issue, I deal first with a preliminary point taken by D2-D12. They submit that this application is a waste of time. They acknowledge I have read this evidence and contend that professional judges are quite capable of leaving those matters out of account if they are inadmissible. This argument misses the point made by TTL which is that if D2-D12 are permitted to rely on these findings on the preliminary issue application, that will greatly increase the amount and cost of the evidence they would wish to file in response. On this strike out application, TTL's argument is very simple. They say all the evidence in section D is inadmissible and they contend that they should not be put to that trouble and expense of having to answer it. They also say the Hollington Material is irrelevant.

16. The arguments put forward by D2-D12 seem to have developed and morphed over time, but that does not mean that the arguments as put forward in Mr Isaac's oral submissions should be assessed other than on their merits.

17. Turning to the substance of the issue, in his skeleton argument for D2-D12, Mr Isaac made two key submissions:

    i) First that evidence of the conclusions reached by other Judges, although not admissible to determine the merits of the claim on summary judgment or at trial is admissible at the interlocutory stage 'where it is relied on to establish that there is a substantial issue between the parties (for example that a claim of fraud has been properly pleaded, or that a claim presents a serious issue to be tried)'.

    ii) Second, that the judgments are admissible at trial as a factual record of the facts recited therein.

18. In support of the first proposition, D2-D12 rely on four authorities, which I summarise as follows, expanding slightly on D2-D12's submissions on them.

19. First *Medcalf v Mardell* [2003] 1 AC 120, a case in which a wasted costs order was sought against two barristers who had alleged fraud on what was said to be an improper basis. In addressing these issues, the House of Lords considered the type of evidence on which counsel could properly rely to justify their pleading of fraud. Lord Bingham of Cornhill addressed the point as follows (at [21], emphasis added):

> "At the hearing stage, counsel cannot properly make or persist in an allegation which is unsupported by admissible evidence, since if there is not admissible evidence to support the allegation the court cannot be invited to find that it has been proved, and if the court cannot be invited to find that the allegation has been proved the allegation should not be made or should be withdrawn. **I would however agree with Wilson J that at the preparatory stage the requirement is not that counsel should necessarily have before him evidence in admissible form** but that he should have material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it. **I could not think, for example, that it would be professionally improper for counsel to plead allegations, however serious, based on the documented conclusions of a DTI inspector or a public inquiry, even though counsel had no access to the documents referred to and the findings in question were inadmissible hearsay.** On this point I would accept the judgment of Wilson J."

20. In *Joint Stock Co Aeroflot – Russian Airlines v Berezovsky and others* [2013] EWCA Civ 784 [2013] 2 Lloyd's Rep. 242, the Court of Appeal considered (among other issues) whether there was a serious issue to be tried against a BVI-

domiciled entity (referred to as 'Finance' in the judgment) in allegations of fraud brought by Aeroflot against two individuals, Mr Berezovsky and Mr Glushkov, and a group of companies ('Forus') allegedly controlled by them.

21. Aeroflot relied on findings of a Swiss criminal court that Mr Glushkov had abused his position in Aeroflot so as to profit from transactions between Aeroflot and another group of companies, with a similar structure and the same ultimate beneficial owners, known as the Andava group. The Swiss criminal court also made findings about the interaction between the Forus and Andava groups, on which Aeroflot relied. Aeroflot relied on the findings as 'similar fact' or 'bad character' evidence to support the similar allegations of fraud made in connection with the relationship between Forus and Aeroflot.

22. In concluding that there was a serious issue to be tried in the claim against Finance, Aikens L.J. said at [115]:

> "For the purposes of demonstrating that there is a 'serious issue to be tried', Aeroflot can properly rely on the Swiss criminal court finding that, in the 'Andava fraud' affair, Finance was involved in the movement of funds whose origin was Aeroflot."

23. Mr Isaac submitted that the same approach was adopted by Mrs Justice Carr (as she then was) in *Sabbagh v Khoury* [2014] EWHC 3233 (Comm). Although reversed on appeal on other issues, her judgment on the *Hollington* issue is accepted to be authoritative. In that case, the claimant, Sana Sabbagh, sought to bring a claim alleging that she was deprived of shares in a company. One defendant (Wael Khoury) was domiciled in England and others were domiciled abroad. The Defendants contended that there was no sustainable claim against the anchor defendant and no basis for bringing proceedings against the other defendants in England.

24. As part of her case that there was a serious issue to be tried against Wael, Sana sought to rely on certain judicial findings made in the Masri litigation. The Defendants contended that those findings were inadmissible, relying on *Hollington v Hewthorn* and *Rogers v Hoyle*.

25. Sana's argument was summarised in these terms by Carr J. at [203]:

> Sana, on the other hand, contends that the rule in *Hollington v Hewthorn* does not prevent the use of findings in other litigation at an interlocutory stage. This is because the rationale of the rule in *Hollington v Hewthorn* is to exclude findings that are no more than the opinion of another person, based on unknown facts, so as to preserve the fairness of the trial. There is no risk to fairness of a trial if such material is introduced on the question of whether or not there is a serious issue to be tried. Such material can assist in identifying the evidence which can reasonably be expected to be available at trial, to which a court is entitled to have regard at the interlocutory stage.

26. The Judge then went on to quote from Aikens LJ in *Berezovsky*, as set out above, and later records the Defendants' submission that it was not clear whether any point on admissibility was taken in that case – there is no mention of the rule in *Hollington v Hewthorn.*

27. Carr J. then discussed the decision of the Privy Council in *Calyon v Michailidis and others* [2009] UKPC 34, on which the defendants relied. In that case the claimants made an application for summary judgment in their claim for ownership of a collection of Art Deco furniture. They failed at first instance, but succeeded in the Court of Appeal. Their claim was based centrally on what was said by them to be a conclusive determination of ownership of the art collection in their favour by the Greek court. No other evidence of ownership was advanced for the claimants, even though ownership was critical to the claimants' case. As Carr J. said at [205]:

> 'The Privy Council ruled that the judgment of the Greek court could not be relied on, adopting the reasoning in *Hollington v Hewthorn*, and dismissed the application for summary judgment. It described the essential reasoning in *Hollington v Hewthorn* as "compelling : unless the second court goes into the facts itself, it cannot actually tell what weight it should properly attach to the previous decision. Which means that the previous decision itself cannot be relied upon." (see paragraph 27).'

28. Carr J. concluded at [206] &[207] that:

> "206. I am inclined to agree with Sana that the findings of another court may be relied on at an interlocutory stage for the limited purpose of demonstrating whether there is a serious issue to be tried, for example in considering what material at trial there might be. The Court of Appeal in *Joint Stock Co Aeroflot – Russian Airlines v Berezovsky* (supra) clearly thought it appropriate to do so, and would have been well aware of the relevant principle in *Hollington v Hewthorn*. To deploy the findings of another court in this way does not endanger a fair trial for any of the parties. The situation in *Calyon v Michailidis and others* (supra) is distinguishable: there the findings of the Greek court were being relied on as conclusive, alternatively probative, evidence of a central plank of the claimants' case, without more.
>
> 207. Thus, to the extent that the Masri litigation is being used simply to inform the question of whether there is a properly arguable claim in prospect, that is, in my judgment a legitimate exercise in principle. To the extent that Sana seeks to use any findings in the Masri litigation as admissible evidence to prove a fact in issue

> or a fact relevant to the issue in these proceedings, I agree with the Defendants that she cannot do so (see paragraph 28 of the judgment in *Calyon v Michailidis* and others (supra)).”

29. Ultimately Carr J. concluded there was nothing in the Masri litigation which assisted Sana.

30. Based on those cases, Mr Isaac’s submission in his skeleton argument was as follows:

> ‘.. while the judgment and conclusions of other judges are not admissible to prove the truth of those conclusions (whether at trial or for the purpose of summary judgment), they are admissible as evidence in support of the contention that there is a genuine issue of fraud that the Court should consider carefully. That is the basis on which the ‘Hollington Material’ is relied on in Elliss 1, and the attempt to have that material struck out is therefore misconceived in law.’

31. Both in his skeleton argument and at the very start of his oral submissions Mr Friedman made it clear that TTL did not dispute that there was a serious issue to be tried, as I understood it, on both ownership and fraud. On that basis, he submitted that any argument based on *Sabbagh* had plainly disappeared.

32. It seems to me that Mr Isaac and his junior had already anticipated that that concession was going to be made by TTL. I say that because in their Skeleton Argument, they submitted the Hollington Material was admissible evidence to show that D2-D12 had ‘a very strong prima facie case that the claim is a fraudulent fabrication and that TTL is advancing this claim despite knowing that it has no proper claim to the Digital Assets’, and other submissions to like effect (‘cogent evidence indicating fraud’, ‘very serious issue’). In his oral submissions, Mr Isaac submitted in terms that his case was ‘seriously stronger than just a serious issue to be tried’.

33. Mr Isaac also submitted that the Hollington Material could only be struck out if it cannot be relied upon for any purpose and if the evidence was useable for a permissible purpose, it could not be struck out. That led me to enquire of him what he said was the permitted purpose here, particularly in view of his case as pleaded in the Defence of D2-D12.

34. He submitted that the true rule was as follows.

    i) Findings of fact by another decision maker are inadmissible at trial or in a final determination of the matter in issue because to rely on them would oust the court’s right and duty to determine the facts on the evidence before it, whereas

    ii) Such findings are not inadmissible in relation to preliminary or provisional determinations of the court which do not finally decide the issue.

35. He went on to submit that whether the test was good arguable case or a real prospect of success or a strong prima facie case or who has the better of the argument, all being tests of the apparent merits of the claims being advanced, applying in different contexts, the rule does not apply because in all of those cases what you are doing is estimating at a pre-trial stage, on the basis of imperfect information and an imperfectly complete evidence base, what the likely strength of the parties' cases at trial will be. It is an assessment, not a determination of what evidence there may be at trial.

36. Reference was also made in argument to the guidance set out by Neuberger J. (as he then was) in *Steele v Steele* [2001] C.P Rep. 106, as to when a preliminary issue should be ordered. Neuberger J.'s 10 factors can be summarised as follows:

(1) whether the preliminary issue would dispose of the case or one aspect of the case;

(2) whether the determination of the preliminary issue could significantly cut down the cost and time involved in pre-trial preparation or in connection with the trial itself;

(3) if a question of law, how much effort, if any, would be involved in identifying the relevant facts for the purpose of the preliminary issue;

(4) if an issue of law, to what extent it is to be determined on agreed facts;

(5) where the facts are not agreed, to what extent that impinges on the value of a preliminary issue;

(6) whether the determination of a preliminary issue might unreasonably fetter either or both parties or, indeed, the court, in achieving a just result;

(7) to what extent there is a risk of the determination of the preliminary issue increasing costs and/or delaying the trial;

(8) to what extent the determination of the preliminary issue may be irrelevant;

(9) to what extent there is a risk that the determination of a preliminary issue could lead to an application for the pleadings being amended so as to avoid the consequences of the determination; and

(10) whether, taking into account all the previous points, it is just to order a preliminary issue.

37. Mr Isaac made a series of points on certain of the *Steele v Steele* factors:

i) The question of whether to order a preliminary issue is a case management decision in which the court exercises a discretion and which is necessarily fact-sensitive.

ii) There is no exhaustive list of factors which the court can take into account.

iii) The *Steele v Steele* factors are guidance and not a statute.

iv) Factor (1) is whether the preliminary issue would dispose of the case or one aspect of the case. He points out the preliminary issues here are issues of fact and will only dispose of the case if the defendants are successful. Therefore, he suggested that the question of how likely it is that the preliminary issues would efficiently dispose of the case depends in part on the merits of the defendants' case. He added that is not to suggest that there needs to be a mini-trial, but if his case on ownership and fraud only just crept over the line, then the prospect of resolving this action through the preliminary issues would be low, whereas if the defendants have a very strong prima facie case, then the prospects of saving time and costs through the preliminary issue mechanism will be higher.

v) On factor (5), he accepted the defendants are asking for determinations of issues of fact, which will require disclosure, the service of evidence and the assessment of that evidence. Again, he submitted that in order to assess the efficiency of the preliminary issue route, the court needs to have in mind what the issues for determination will be and, for that purpose, he submitted it is relevant for the court to understand the nature of the arguments the defendants are going to make and their apparent merits.

vi) On factor (7), Mr Isaac submitted that it is the same point as on factor (1). If the defendants have a barely arguable contention of fact, there is a very high risk that separating it out increases costs and extends the time to reach a resolution of the case. By contrast, if the defendants have a very strong case on the factual issues then there is a better chance that it will shorten the trial and a lower chance it will increase overall time and cost.

vii) On factor (10), whether it is just in all the circumstances to order a preliminary issue, Mr Isaac submitted that the defendants had very strong evidence that Dr Wright does not own the assets he claims to own, and that he is bringing this claim fraudulently. That meant, in effect, that the defendants should not be put to the expense of dealing with the very complex technical issues that arise in the remainder of the trial.

38. Mr Isaac's points on the *Steele* factors essentially reduced to the same point: the stronger his case on ownership and fraud was, the greater the reason to order a preliminary issue. The underlying point being that he should be permitted to rely on the findings of fact made by judges/decision-makers in other proceedings on the preliminary issue application to demonstrate the strength of his case on ownership and fraud.

Discussion

39. This ought to have been an application that was capable of disposal at a short hearing. Instead, I received lengthy skeleton arguments, a bundle of 20 authorities and the oral arguments took up half a day. The arguments became

increasingly elaborate and somewhat theoretical at times, no doubt a product of the potential amount at stake in this action.

40. It seems to me that the common theme which is discernible through *Medcalf*, *Berezovsky* and *Sabbagh* is that there is a limited exception to the rule in *Hollington v Hewthorn* which is applicable in situations where the case is at a preparatory stage yet the court has to consider what evidence at trial there might be. This exception plainly applies where the court is considering whether there is a serious issue to be tried (*Berezovsky* and *Sabbagh*) but also when the court has to consider whether counsel had sufficient material to justify a plea of fraud (*Medcalf*). The material (inadmissible at trial) can assist in identifying the evidence which can reasonably be expected to be available at trial, to which a court is entitled to have regard at the interlocutory stage.

41. On the pleadings in this case, the defence of D2-D12 indicates what material they are going to rely on at trial because it is set out in paragraph 54 of their defence. Paragraph 54 is absolutely central to D2-D12's case. It sets out the material on which those defendants dispute TTL's ownership and also the material which those defendants contend establishes that this case is a fraudulent abuse of process. As TTL notes, the defence is somewhat repetitive, but the thrust of D2-D12's case is clear.

42. Thus, paragraph 1 of their defence pleads:

> "This is a fraudulent claim. TTL does not own the digital assets it claims to own in these proceedings and has never owned them. As particularised at paragraph 30 below, TTL has made a deliberately false claim to ownership of these assets and has commenced these proceedings knowing that it has no claim in respect of those assets. The claim is accordingly an abuse of the Court's process."

43. Paragraph 30 pleads:

> "30. It is averred that this claim is an abuse of process because it has been brought by TTL fraudulently in the knowledge that it has no claim. As to this:
>
> 30.1. As pleaded at paragraph 54 below, Dr Wright and TTL do not have and have never had an interest of any kind in the digital assets in the Addresses.
>
> 30.2. Dr Wright and TTL must, necessarily, have known this and did know it.
>
> 30.3. In the premises, this claim is an abuse of process because Dr Wright and TTL have known at all material times that TTL has no claim."

44. Then paragraph 54 starts as follows:

> '54. It is to be inferred that neither TTL nor Dr Wright owns, or has ever owned, the Bitcoin in the Addresses (save where otherwise specified, all references below to Dr Wright's alleged ownership of the Bitcoin in the Addresses include alleged ownership by TTL or any other entity allegedly related to Dr Wright). In particular:'

45. It is not necessary to quote sub-paragraphs 54.1-54.8 but those subparagraphs contain matters which relate directly to the Addresses in question. However, at paragraph 54.9, the plea starts:

> 'Dr Wright has fabricated documents or otherwise provided deliberately false evidence on numerous prior occasions (including documents or evidence concerning his alleged ownership of digital assets). In particular:'

46. Then paragraphs 54.9.1 to 54.9.7 plead reliance on some 7 instances where it is said that Dr Wright either forged or intentionally altered documents or gave evidence which he knew to be false. These 7 instances are drawn from various proceedings which involved Dr Wright, namely, an Australian Tax Office investigation, the *Kleiman* litigation in Florida, his libel claim against Mr *McCormack* in this country and the *Granath* litigation in Norway.

47. Although some of these instances are a little vague as to precisely which documents are alleged to have been forged, no doubt those instances will be fleshed out in more detail at a later stage.

48. There are two points to note about these instances:

    i) First, their relevance is as similar fact evidence (and, in that regard, some case management may be required in due course).

    ii) Second, the allegations relate to what Dr Wright is alleged to have done, not what any of the Judges in those cases found that he did.

49. I emphasise that these are all *allegations* put forward by D2-D12. In response, TTL's Reply to their Defence contains a substantial number of paragraphs which address and refute the allegations in paragraph 54 in detail (see paragraphs 92-108 of the Reply) and support the original allegations in the Particulars of Claim.

50. Thus, subject only to possible amendments to the Defence to plead reliance on some further matters e.g. some matters which are said to have been made public over the weekend before this hearing, this is not a situation where the court has to make an assessment as to what material *might* be available at trial. We know, from paragraph 54 of the defence, what material D2-D12 are going to rely on at trial, although it remains to be determined (at trial) whether any of these allegations are proved. The situation in the present case does not fit the common theme I discerned from *Medcalf, Berezovsky* and *Sabbagh*.

51. For most of the hearing I confess I was inclined to accede to TTL's application and strike out the 'Hollington Material', not only on the ground of inadmissibility but also irrelevance. However, having reflected on the point(s) made by Mr Isaac on the *Steele v Steele* factors, his basic point is a powerful one. Whilst one must guard against conducting any sort of mini-trial, as I said above, the stronger his case on ownership and fraud is, the greater the reason to order a preliminary issue. Although Mr Isaac accepts that at the trial (whether the full trial or the trial of preliminary issue(s)) he will have to prove the allegations that forged documents were put forward by Dr Wright in the various other proceedings, in order to strengthen his prospects of the court ordering preliminary issue(s), Mr Isaac wishes to rely not just on the allegations pleaded in paragraph 54 of the defence of D2-D12, but on the facts that other judges in other proceedings have found Dr Wright to have put forward forged documents and given unreliable evidence.

52. This reliance would not, in my view, offend against the *Hollington* rule, because when deciding whether to order preliminary issue(s), I must not conduct a mini-trial. With the key passage from the Privy Council in mind, a mini-trial would mean I was going into the facts of the alleged instances pleaded in paragraphs 54.9 and/or the findings quoted by Mr Elliss in his section D. Furthermore, a mini-trial would mean I would be assessing what weight I should attach to each of the previous decisions. However, I recognise that, even without conducting any sort of mini-trial, Mr Isaac would be inviting me to attach *some* weight to each of the previous decisions.

53. I emphasise that I have not heard the arguments for and against whether preliminary issue(s) should be ordered in this case.

54. Although Mr Friedman conceded there was a serious issue to be tried on both ownership and fraud, his concession still leaves him, it seems to me, able to make submissions as to the strength of his case and the corresponding weakness of the case of D2-D12 on both ownership and fraud. If Mr Friedman is able to argue against preliminary issue(s) on the basis of contentions as to the weakness of the allegations of D2-D12, I do not see why Mr Isaac should not be able to argue for preliminary issue(s) based on his contentions as to the strength of his case on ownership and fraud.

55. Furthermore, there is a difference between these two situations, which it is difficult to ignore:

    i) first, where the court simply has a series of allegations that documents have been forged or altered which have not yet been addressed in expert and other evidence; and

    ii) second, where competent courts and other decision makers have made findings, based on expert and other evidence, that documents presented to those tribunals were forged or altered.

56. I will keep in mind that, when deciding whether to order preliminary issue(s), I must not conduct a mini-trial, and I note TTL has not yet served its evidence in opposition to the applications for preliminary issues. There are a number of possibilities: TTL may serve extensive evidence refuting all the allegations of

forgery or giving other reasons why the findings by the various judges were wrong or alternatively TTL may serve little or no evidence by way of refutation or the evidence may be somewhere between those two extremes. The service of extensive evidence would militate against any sort of mini-trial being conducted. One would simply have to note the arguments made on each side. Furthermore, if TTL served little or no evidence by way of refutation, that too would be unlikely to result in any mini-trial, since the picture would be clearer.

57. On the arguments presented to me and in view of the short time I have to consider them, I leave for another day the decision whether the breadth of the propositions advanced by Mr Isaac (as summarised in paragraphs 1717.i), 34 and 35 above) are correct. I have not found it necessary to address the proposition set out at paragraph 17.ii) above. Although as I have indicated, my inclinations have changed on this issue, it suffices for me to say that in the particular circumstances of the impending applications for preliminary issues, I do not consider it right to strike out the Hollington Material because reliance on it for the purposes of those applications does not seem to me to offend against the rule in *Hollington v Hewthorn.* I therefore refuse TTL's application.

Postscript

58. The day before the hearing, D2-D12 sent through a further witness statement, Elliss 4, which was sworn on 1st October 2023. Mr Elliss recounts a series of very recent events which were made public over the preceding weekend. Since TTL had not had any opportunity to respond to Elliss 4, I did not consider it right to take any account of its content when deciding TTL's application to strike out and the parties will note there is no reference to Elliss 4 or any of its content in my decision set out above.

59. However, it remains the case that D2-D12 have an outstanding application notice dated 2nd October 2023 in which they seek (1) permission to be able to rely on Elliss 4 in support of their application for a preliminary issue trial (which I will call 'D2-D12's Reliance Application') and (2) an order that TTL provide D2-D12 with security for their costs up to the conclusion of the CMC on an urgent basis ('D2-D12's Interim SFC Application'). At the conclusion of the hearing yesterday, I indicated to the parties that I would consider what directions to give in relation to this new application.

60. Overnight, the solicitors for TTL wrote setting out their position. Whilst they stress that TTL's position on all issues arising out of Elliss 4 is strictly reserved and without prejudice to that, they helpfully indicated that TTL is prepared to agree to certain directions:

    i) TTL will confirm to D2-D12 whether or not it consents to D2-D12's Reliance Application by 4pm on 11 October 2023.

    ii) If TTL consents, it will file its substantive response (if any) to Elliss 4 by 4pm on 18 October 2023. If TTL objects, it will file its responsive evidence setting out the reasons for its objections by 4pm on 18 October 2023.

iii) In addition, in respect of D2-D12's Interim SFC Application, TTL is prepared to agree to make an interim payment into Court by 4pm on 18 October 2023 of 50% of D2-D12's costs of the Proceedings up to and including the CMC, pending the determination of D2-D12's Security for Costs Application at the CMC. TTL understands from page 733 of Exhibit TWE-1 that D2-D12's incurred and estimated costs up to and including the CMC amount to £423,078.50 and, for the avoidance of doubt, TTL is prepared to provide security in the sum of £211,539.25.

61. At this point I simply note the offer which has been made by TTL. Following brief discussion at the hand down of this judgment, I have invited the parties to file written submissions as to how the future conduct of the outstanding application should be handled.