Tulip Trading Limited v van der Laan & Ors firmly in the cross hairs as the Court of Appeal takes aim at decentralised governance.

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3RD **APRIL 2023**

If *Tulip Trading Limited v van der Laan & Ors* had failed to capture the interest of crypto-curious litigators before the Court of Appeal's decision on serving outside the jurisdiction, it may well have now.

Last month, in the leading judgment delivered by Lord Justice Birss, the Court of Appeal unlocked the door to perhaps the most significant stride forward in the common law's approach to crypto-fraud. The Court of Appeal overturned the High Court's finding that Tulip Trading Limited ("**Tulip**") failed the first limb of the service out test, namely whether there was a serious issue to be tried on the merits in respect of an alleged fiduciary duty owed to Tulip by the developers of Bitcoin networks. While the Court of Appeal's finding was of a summary nature, necessarily only going so far as to hold Tulip had an arguable case, it is consistent with the judiciary's recent efforts to facilitate remedies for victims of crypto-fraud by incrementally extending traditional common law principles.

Facts

Tulip claimed to be the owner of approximately US$4 billion of bitcoin that it alleged was stolen in a hack. Specifically, Tulip alleged its private keys, which allow their holder to access the bitcoin, were deleted and that the developers were able to (but critically, did not) re-write the relevant network's software to implement a patch that would return control of the bitcoin to Tulip.

Tulip's case is that the developers exercised such a degree of control over the bitcoin through their ability to re-write the networks' software and restore its access that a new *ad hoc* fiduciary duty arose in favour of Tulip as the bitcoin's rightful owner. Further, by failing to exercise this control to remedy the effects of the hack, the developers were in breach of this duty and owed Tulip equitable compensation in damages and Tulip sought declarations to that effect. However, as all the defendants were resident outside of the jurisdiction, it was first required to satisfy the requirements for service out after the defendants applied to set aside the permission initially granted to Tulip.

The developers denied that they exercised control of the relevant networks to the extent alleged by Tulip and maintained instead that they were simply a small part of a decentralised model consisting of a *"very large, and shifting, group of contributors without an organisation or structure"*[1]. They also argued that a finding of a fiduciary duty in Tulip's favour would amount to a finding that they owed a duty of undivided loyalty at the exclusion of other users of the networks, which exposed them to potential liability in respect of such users.

High Court decision

In the High Court, Mrs Justice Falk ruled against Tulip on the first ground of the service out test, finding that it had failed to establish a serious issue to be tried on the merits because she considered that there was no realistic prospect of Tulip establishing that the facts pleaded amounted to a breach of fiduciary or tortious duty owed by the developers to Tulip. Mrs Justice Falk acknowledged there was an imbalance of power between the developers and Tulip as the user. However, she noted that while an imbalance of power is a feature of a fiduciary duty it is not determinative, nor sufficient on its own, to establish one. She was not convinced that the developers were in fact in control of the relevant networks given their relatively small role within the decentralised blockchain and went on further to conclude that it could not be realistically argued that they owed a continuing obligation to remain as developers and make future updates when necessary.

However, Mrs Justice Falk's main reason for finding against Tulip was that any fiduciary duty relied on must be owed to Bitcoin users generally and the steps that Tulip required would be for its benefit alone at the exclusion to those with a rival claim to the assets. She was not satisfied with Tulip suggesting the duty was in fact owed to the true owner of the bitcoin given the fundamental nature of crypto is that it can only be accessed with private keys and Tulip essentially sought to bypass that in requesting the patch.

At best, Mrs Justice Faulk considered there might be a relationship of trust and confidence which

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[1] *Tulip Trading Ltd v van der Laan & Ors [2023] EWCA Civ 83* at [33].

could be extended to a duty to not compromise the owners' security; however, this fell short of a duty of undivided loyalty.

Court of Appeal

The Court of Appeal relied upon the defining characteristics of a fiduciary set out in *Bristol and West Building Society v Mothew* [1998] Ch 1, noting that the key characteristics to be taken from *Mothew* are *"acting for or on behalf of another person in a particular matter and also that there is a relationship of trust and confidence between the putative fiduciary and the other person."*[2]

The key to Tulip's case was the way in which the developers exercised control over the software, including by accessing the source code and making decisions on behalf of other users. The Court considered these features resembled (i) an authority to act for or on behalf of users, and (ii) discretionary decision making, both of which were features common to fiduciary duties.

The Court agreed with Mrs Justice Falk's conclusion that the developers ought to owe a duty in law to bitcoin owners not to compromise the owners' security. This duty arose from their role as developers which involved acting on behalf of bitcoin owners to maintain the networks' software and required them to put the interests of the owners as a class ahead of the developers' own self-interest.

However, it then went further to find that it was arguable that such a duty extended further than a negative duty to not exercise their power in their self-interest to a positive duty to fix bugs in the code which are drawn to their attention. Only the developers can fix an identified bug by exercising their de facto power and users expect this when they entrust their property into the care of the developers. While there may be disagreements as to how a bug ought to be fixed (or whether a bug ought to be fixed at all), the developers still make a decision to implement a change, presumably in good faith. The Court of Appeal was not persuaded by the developers' argument that this would give rise to a duty of undivided loyalty to the exclusion of other users given trustees, by analogy, often make decisions that favour the interests of one beneficiary over another, and this does not preclude it being in accordance with the relevant fiduciary duty.

Ultimately, the Court of Appeal decided that the developers' ability to make discretionary decisions and exercise power on behalf of users who have entrusted property into their care gave rise to a duty of single minded loyalty to users of bitcoin software (ie a duty of loyalty to the exclusion of others). This duty included a duty both not to act in their own self-interest but also to act in positive ways in certain circumstances including, arguably, to introduce code so that a user's bitcoin can be transferred to safety in the circumstances alleged by Tulip.

Analysis

Being a summary decision, the Court of Appeal has simply laid the foundation for a finding on this issue at trial. Tulip's case will face a much sterner test in establishing whether a duty ought to be found at trial where the balance of probabilities standard applies. While the Court of Appeal noted that *"the time to decide on the duty in this case is once the facts are established"*[3], Tulip will first be required to convince the court that it was the rightful owner of the bitcoin, which is no certainty. If it fails, followers of this case can only hope for obiter comments on this issue.

Notably, at the end of his judgment Lord Justice Birss appeared to indicate what he considered to be a key factual determinant if this issue is to be ruled upon at trial. He noted that *"if the decentralised governance of bitcoin really is a myth, then in my judgment there is much to be said for the submission that bitcoin developers, while acting as developers, owe fiduciary duties to the true owners of that property"*[4]. In other words, if Tulip is able to establish that the developers do in fact exercise the degree of discretionary control over the various network software code, then the networks cannot be said to be fully decentralised and developers may well be unable to avoid owing duties to users by hiding

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[2] At [70].
[3] At [91].
[4] At [91].

within their unidentified, shifting class. This analysis will involve a rigorous factual examination of the two pillars of the Court of Appeal's decision: the authority of developers to act on behalf of users and the precise scope of their discretionary decision-making.

A finding in Tulip's favour will be heavily scrutinised given this concept of decentralisation lies at the very heart of cryptocurrency. However, it would not be the first time law makers in the UK have contemplated developers owing legal obligations on these bases. In *Digital Assets: Consultation Paper*[5], the Law Commission considered that developers could *"be at risk of being categorised, and of owing legal obligations, as direct custodians **if they were genuinely capable of exercising discretionary negative and positive control of crypto-tokens in a real and immediate sense**. The risk would be minimal for developers that merely comprise an unidentified, shifting class of persons without any formal organisational structure and whose ability to exert positive and negative control was remote and essentially hypothetical"* [6] (emphasis added).

This Consultation Paper was released between the High Court and Court of Appeal decisions, which may explain why this passage, without the benefit of the Court of Appeal's judgment, falls short of stipulating a fiduciary duty obligation. Nonetheless, it illustrates the emphasis that the developers of the law in the UK are placing on the exercise of control when determining how traditional common law principles, such as fiduciary duties, ought to apply to crypto disputes.

If this is the key to what has previously been a firmly locked door for claimants seeking a party to pursue in respect of alleged crypto fraud, then it is difficult to say whether it will unlock Tulip's case. However, we can be sure that these questions will continue to be rigorously tested in the Courts of England & Wales by claimants seeking to take aim at developers in similar cases, particularly as the role of developers continues to evolve alongside the networks they design. Given the apparent intent of the judiciary, and the UK government, to develop a jurisdiction that appeals to such claimants, developers may need to get comfortable operating with a target on their back.

[5] Law Commission, *Digital Assets: Consultation Paper* (Law Com No 256, 2022).
[6] At [16.38].

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