

# DIGITAL SECURITY FOR COSTS: PRACTICAL ASPECTS

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As the legal landscape adjusts to the growing prevalence of digital currencies and assets, one cannot help but wonder: could digital assets be the innovative solution to security for costs in litigation? In this article, we explore the practical aspects of harnessing the power of digital assets for the protection of litigation costs.

## Security for costs by way of digital assets

An order for security for costs offers protection to a party defending proceedings from the risk that their opponent (usually the claimant) may not be able to pay their litigation costs if ordered to do so on the determination of a case. The court may make an order for security for costs if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order and one or more certain conditions set out in CPR25.13(2) apply. These conditions include where the claimant is resident outside the jurisdiction, impecuniosity of a corporation, the claimant has failed to give an address or changed their address since the claim was issued with a view to evading the consequences of the litigation, there is a nominal claimant, or where a claimant has taken steps in relation to their assets to make enforcement difficult.

Security for costs can take various forms including payment into court or to a solicitor on specified terms, a bank guarantee, or charges over physical assets.<sup>(1)</sup>

In *Tulip Trading Limited v Bitcoin Association for BSV & Ors*,<sup>(2)</sup> Master Clark did not accept cryptocurrency as a suitable form of security for costs, concluding that the value of cryptocurrency was too volatile. Whilst volatility may be a challenge, there are potential ways to address these concerns. Other jurisdictions have permitted a claimant to provide security for costs by way of an undertaking in respect of an investment account with an online digital asset exchange, holding digital assets with a value of slightly more than the value of security agreed, noting that the digital assets in question were “a recognised form of investment”.<sup>(3)</sup>



## How could digital security for costs work in practice?

### 1. Blockchain technology

The transparency and immutability of blockchain ledgers provide a reliable and tamper-resistant record of transactions. Digital security for costs could allow for public addresses, which hold the assets, to be provided to defendants and/or their solicitors. In this way, defendants would be assured of their location and have the ability to continually monitor their value.

Smart contracts, being self-executing agreements powered by blockchain technology, could also be utilised to automate the release of funds in accordance with court decisions, streamlining the process.

### 2. Custodian Services

There are also a growing number of custodian service providers. HSBC has recently announced plans to partner with Swiss digital asset service provider Metaco to offer a custody service for storing blockchain-based tokenised securities (excluding cryptocurrency).<sup>(4)</sup> Custodian service providers offer secure storage of various digital assets providing cold storage, multi-signature wallets, private key management, and online security services. Third party custodian service providers could be utilised to hold digital assets as a form of security of costs.



(1) *Saurymper and another v Fishman Brand Stone (a firm)* (2022) EWHC 752 (Ch)  
(2) *Tulip Trading Limited v Bitcoin Association for BSV & Ors* (2020) EWHC 141 (Ch)  
(3) *Hague v Cordiner (No. 2)* (2020) NSWDC 23

### 3. Digital wallets for claimant solicitors

Security being provided by way of a solicitor's undertaking to hold monies received from a client is considered acceptable. Digital assets could be transferred to a digital wallet controlled by a claimant's solicitors, with an undertaking from those solicitors that those digital assets would be used on behalf of a claimant to satisfy any adverse costs order or other order.

### 4. Court designated wallet

Payment into court (usually by way of a cheque to the Courts Funds Office) is already an acceptable form of security for costs.

The Court has also ordered the delivery up of cryptocurrency in the case of *Joseph Keen Shing Law v Persons Unknown & Huobi Global Limited*<sup>(5)</sup> (decided in January 2023 but only reported recently). However, in order to do this, the cryptocurrency had to be converted into fiat currency and then transferred into court pending the claimant's application to enforce judgment against those assets. The Court required a cross undertaking in damages by the claimant to ensure the costs of converting the cryptocurrency into fiat currency (and vice versa) was covered. A court designated digital wallet could avoid this requirement and the risks associated with a cross undertaking in damages. It would also facilitate the holding of digital assets as security for costs.

### Addressing volatility

A challenge associated with cryptocurrency as a form of security for costs is its volatility and how to address possible fluctuations in value. To address this concern, a claimant could offer a quantum of security higher than that ordered by the court. An appropriate 'buffer' (perhaps higher than 10%) could also be deployed on top of any ordered sum with a mechanism for topping up the value of the security if required.

In addition, the issue of volatility may soon be less critical with central bank digital currencies (CBDCs)<sup>(6)</sup>, stable coins or a digital pound.



(4) <https://www.nasdaq.com/articles/hsbc-to-offer-custody-services-for-tokenized-securities#:~:text=HSBC%20Holdings%20plc%20HSBC%20has,financial%20assets%2C%20whi ch%20excludes%20cryptocurrency.>

(5) *Joseph Keen Shing Law v Persons Unknown & Huobi Global Limited* (2023) WL 03483927

(6) Some 130 countries representing 98% of the global economy are exploring central bank digital currencies (CBDCs): <https://www.reuters.com/markets/currencies/study-shows-130-countries-exploring-central-bank-digital-currencies-2023-06-28/>



### CONCLUSION

In today's rapidly evolving digital landscape, the question of whether digital assets can serve as suitable security for costs is becoming increasingly relevant. Indeed, considering how the market is evolving, the above solutions may now be considered viable. Volatility is no longer the obstacle it once was, and the English courts appear willing to adapt quickly to the rise in complex crypto disputes. As the world we live in becomes increasingly digital, a new digital pound or more stable crypto assets could pave the way for digital assets meeting the test for adequate security.



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