



Neutral Citation Number: [2020] EWCA Civ 672

Case No: A2/2019/2072

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**MEDIA AND COMMUNICATIONS LIST**  
**The Honourable Mr Justice Nicklin**  
**QB/2019/1430**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 29/05/2020

**Before :**

**LORD JUSTICE FLAUX**  
**LORD JUSTICE POPPLEWELL**  
and  
**LORD JUSTICE DINGEMANS**

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**Between :**

**Craig Wright**  
**- and -**  
**Roger Ver**

**Appellant**

**Respondent**

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**Adam Wolanski QC and Greg Callus (instructed by SCA ONTIER LLP) for the Appellant**  
**Hugh Tomlinson QC and Ian Helme (instructed by Brett Wilson LLP) for the Respondent**

Hearing date : 6 May 2020  
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**Approved Judgment**

**Covid-19 Protocol:**

**This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunal Judiciary website (press.enquiries@judiciary.uk). The date and time for hand-down is deemed to be 10:00am on Friday 29 May 2020.**

## **Lord Justice Dingemans:**

### **Introduction**

1. This appeal raises issues about the proper interpretation and effect of section 9 of the Defamation Act 2013. Section 9(2) provides that “A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement”. By a judgment dated 31 July 2019 Mr Justice Nicklin (“the judge”) found that England and Wales was not clearly the most appropriate place in which to bring the libel claim in this action and made a declaration that the Court had no jurisdiction to hear the claim.
2. The claimant appeals on the grounds that the judge took the wrong approach to section 9 so that he did not make relevant findings about the appropriate place to bring the libel claim, and that if he had done so England and Wales would be shown to be clearly the most appropriate place to bring the claim. The defendant resists the appeal saying that the judge properly applied section 9 in the circumstances of this case. The defendant also filed a respondent’s notice saying that if the judge did take a wrong approach, the decision should be upheld because on an analysis of the relevant evidence, England and Wales was not clearly the most appropriate place in which to bring the libel claim.
3. By the conclusion of the written and oral submissions it became apparent that the issues on this appeal are whether: (1) the judge took a proper approach to section 9 in this case; and (2) whether England and Wales was clearly the most appropriate jurisdiction to bring the claim.

### **The factual background and the relevant publications**

4. The background to the claim arises in relation to a controversy about who was the developer of Bitcoin. Bitcoin is a cryptocurrency. “Satoshi Nakamoto” is the pseudonym used by the person, or persons, who developed Bitcoin. On 31 October 2008 an academic paper was published under the name of Satoshi Nakamoto titled “Bitcoin: A peer to peer electronic cash system”. The academic paper described the manner in which the electronic cash system operated.
5. Dr Craig Wright, the claimant and appellant, is a national of Australia who now lives in Surrey. He has lived in the United Kingdom since December 2015 after emigrating from Australia. He also became a citizen of Antigua and Barbuda in 2017. He is a computer scientist with a particular interest in cryptocurrencies, including Bitcoin. Dr Wright says that he is Satoshi Nakamoto.
6. Roger Ver, the defendant and respondent, is a bitcoin investor and commentator on bitcoin and other cryptocurrencies. Mr Ver was born in California, in the United States and raised in Silicon Valley. He moved to Japan, which he described in evidence as the global centre for cryptocurrencies, in 2005. In 2014 he renounced his US citizenship and became a citizen of St Kitts & Nevis, although he continues to live in Japan. Mr Ver does not accept that Dr Wright is Satoshi Nakamoto.

7. I should make it clear that this judgment does not address whether Dr Wright is Satoshi Nakamoto. This is because it was not an issue on the appeal.
8. The evidence before the judge showed that Dr Wright and Mr Ver had had good relations in the past, and that Dr Wright described Mr Ver as a “trusted colleague”. It then appears that they developed competing visions for the development of Bitcoin. Mr Ver favoured a version known as Bitcoin ABC. The “ABC” stands for “Adjustable Blocksize Cap”. Dr Wright favoured Bitcoin SV. The “SV” stands for “Satoshi Vision”. Dr Wright considered that Bitcoin ABC was not Bitcoin because it did not work within existing legal frameworks. When it became clear that Mr Ver was not supporting Bitcoin SV there was a falling out which appears to have been in November 2018. The extent of the breakdown in relations appears from the fact that Dr Wright sent Mr Ver an email in which he declared that Mr Ver was his “enemy”.
9. Dr Wright claims that he was libelled by Mr Ver in a YouTube Video posted on the Bitcoin.com YouTube channel on about 15 April 2019, a tweet containing the YouTube Video posted on Mr Ver’s Twitter Account on 3 May 2019, and a reply on Mr Ver’s Twitter Account posted on 3 May 2019 from BkkShadow some 8 minutes after the tweet from Mr Ver. The defamatory meaning of these publications is said to be that Dr Wright “had fraudulently claimed to be Satoshi Nakamoto, that is to say the person, or one of the group of people who developed Bitcoin”.
10. There was evidence about the number of viewers of the YouTube channel and about the followers of Mr Ver’s Twitter Account. The viewers of the YouTube channel were from 25 February 2016 to 22 June 2019: 1,821,515 of which 422,698 (23.2 per cent of the total) were in the US and 96,915 (5.3 per cent of the total) were in the UK. There were further breakdowns of figures for April 2019 showing a total of 73,135 views of which 20,870 (28.5 per cent of the total) were in the US and 4,985 (6.8 per cent of the total) were in the UK. In the period of 14-18 April 2019 there were 24,913 views of which 168,780 (29 per cent of the total) were in the US and 52,554 (7 per cent of the total) were in the UK. The figures showed that there were 582,000 active followers of Mr Ver’s Twitter account, of which 168,780 (29 per cent of the total) were in the US and 52,554 (7 per cent of the total) were in the UK.

### **The proceedings below**

11. Following the publication of the YouTube video on 15 April 2019 a letter before action was sent to Mr Ver on 1 May 2019. On 2 May 2019 Mr Ver was visiting London. A claim form on behalf of Dr Wright complaining of the publication in the YouTube video was issued, and it was served personally on Mr Ver, pursuant to the provisions of CPR Part 6.5(2). Personal service on overseas defendants while temporarily present in this jurisdiction is an established part of the common law, although it has sometimes been considered in other jurisdictions to be an exorbitant exercise of jurisdiction and is excluded as a basis for establishing jurisdiction under certain conventions, see article 3 of the Lugano Convention (Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters) scheduled to the Civil Jurisdiction and Judgments Act 1991.
12. The Twitter postings took place on 3 May 2019. On 16 May 2019 Dr Wright applied, without notice to Mr Ver, to Master Thornett for permission to amend the claim form to introduce the Twitter postings, to serve the proceedings out of the jurisdiction in

Japan, and for permission to serve by email. On 13 June 2019 Mr Ver filed an acknowledgement of service indicating an intention to contest the jurisdiction of the court. The main ground of challenge was based on section 9 of the Defamation Act 2013 but there were other grounds, which it is not necessary to set out.

13. On 27 June 2019 Mr Ver made an application to challenge the court's jurisdiction. Witness statements were filed by both parties up to 25 July 2019. The hearing took place on 29 July 2019 and judgment was given on 31 July 2019.

#### **The evidence at the hearing before the judge**

14. In the light of the issues on this appeal it is necessary to set out some details of the relevant evidence adduced below.
15. The evidence on behalf of Dr Wright was given by: Duncan McElvie, a freelance process server, in a witness statement dated 5 July 2019; Dr Wright, in witness statements dated 17 and 25 July 2019; Simon Cohen, a senior associate at SCA ONTIER LLP, in witness statements dated 18 and 25 July 2019; Michael de Leeuw, a member of the New York Bar in a witness statement dated 19 July 2019; and Jimmy Nguyen, a former CEO of nChain and a former practising attorney in the US, in a witness statement dated 25 July 2019. There was also exhibited to the evidence below a witness statement from Ines Santos, a solicitor at SCA ONTIER LLP made in support of applications made to Master Thornett.
16. The evidence on behalf of Mr Ver was given by: Mr Ver, in witness statements dated 27 June and 23 July 2019; Tom Double, a solicitor at Brett Wilson LLP dated 23 July 2019; Kevin Goering, a member of the New York Bar, in a witness statement dated 23 July 2019; and John O'Brien, a member of the California Bar, in a witness statement dated 23 July 2019.
17. So far as is material the evidence showed that Dr Wright said he was a computer scientist and entrepreneur. He said he was "a highly active member of the cryptocurrency community". Dr Wright said that Mr Ver was an investor in and commentator of the bitcoin and wider cryptocurrency sector.
18. Dr Wright said he was now a resident of England and had a "close, settled connection with the United Kingdom". He said he was born in Brisbane and held Australian and Antiguan and Barbudian citizenship and passports. He got citizenship in Antigua and Barbuda in April 2017 and had spent 30 days there, but he did not intend to acquire a home or settle there. He intended to apply for naturalisation as soon as he had been living in the UK for 5 years. He rented a property in southwest London before moving to Surrey. He was hoping to purchase a property in Surrey. He was married and had a wife and three children. The oldest child attended university abroad but the youngest two children were at school in England. Dr Wright was studying both at Leicester University and SOAS. Dr Wright said that he believed "that it was widely acknowledged that I am one of the world's foremost blockchain experts including in the United Kingdom".
19. Dr Wright said he was working as the Chief Scientist of nChain Limited, a UK company, and was a UK taxpayer. He was on the Advisory Board of nChain, but details of any corporate structure were not given, and I will return to further

information about nChain in paragraphs 33 and 34 below. Dr Wright said he employed UK mathematicians and was concerned about the effect of the claims made by Mr Ver on his ability to attract future recruits.

20. In paragraphs 47 to 49 of his witness statement Dr Wright stated that being labelled a fraud damaged his integrity within the UK's community of business people with whom he primarily dealt. He said that the vast majority of his business peers were in the UK as well as his workplace, and that he had solidly established his professional and personal reputation in the UK. He said he came to the UK to hire personnel of the highest calibre to work in developing, inventing and re-inventing technology and that being able to hire local PhD mathematicians had transformed nChain, stating that the "talented technicians want to join nChain because of my reputation in the field" and that continual attacks in the UK would dash any hope of hiring such talented people.
21. Dr Wright said "I do not have any familial or business ties with the United States. My life is in England, which is why I am bringing a claim in respect of the damage done to my reputation ... in this jurisdiction alone". Dr Wright said "I understand from my solicitor that there will be real difficulties with bringing an equivalent claim for libel in the US", although no reasons were given for this statement.
22. Dr Wright denied that Japan and St Kitts and Nevis were suitable jurisdictions and said that he had no connections with either country and did not believe that he had suffered any, or any significant, reputational harm in those countries as a result of the publications. He referred to the language barrier in Japan and difficulties in bringing the claim. He had been to Japan on eight occasions in relation to conferences and talks.
23. Dr Wright's website had a publication "About Craig" underneath a photograph of Dr Wright, which was exhibited to Mr Double's statement. It ran to 27 lines. It stated "Dr Craig S. Wright is an Australian/Antiguan computer scientist, businessman and inventor who challenges the world with visionary ideas. He is the creator of Bitcoin under the pseudonym Satoshi Nakamoto. His vision is a world with wide-scale adoption of Bitcoin as electronic cash and commodity money ... Currently, Dr Wright is Chief Scientist for nChain – the global leader in advisory, research and development of blockchain technologies." It gave details of his work in Australia. It stated he was a "prolific researcher" and gave details of his work as a lecturer and researcher at Charles Sturt University, which is in Australia. It said he was a "sought-after public speaker internationally". It noted that Dr Wright was currently a candidate for two additional PhD's at Leicester University, UK and CNAM in Paris, France. The reference to the doctorate at Leicester University was the only specific reference to England and Wales in the web publication.
24. Mr Ver said that he understood that the reach of the YouTube channel and Twitter account to be centred in the US. It appears that 31.1 per cent of the subscribers to the YouTube Channel were in the US and 7.5 per cent were in the UK. Mr Ver relied on the evidence of the publications to show that the US was the most appropriate jurisdiction.
25. The evidence showed that Dr Wright was being sued in Florida in the US by the estate of David Kleiman. Mr Kleiman was described in the evidence as a computer forensic

expert who had been an associate of Dr Wright. The estate of Mr Kleiman alleged, but Dr Wright denied, that it was entitled to a share of mined bitcoins. Dr Wright said he had spent only 2 ½ days in the US in the past four years, and that had been only in relation to the proceedings brought by Mr Kleiman's estate.

26. The evidence showed that Dr Wright responded to a US Commodity Futures Trading Commission request for input on crypto asset mechanics and markets in December 2018. He stated that under the pseudonym Satoshi Nakamoto he had completed a project started in 1997 that was filed with the Australian government registered as Blacknet. Dr Wright said he had responded to requests for further information from regulators in the UK, China, US, Singapore, China, New Zealand, Australia and Uzbekistan.
27. The evidence also showed that Dr Wright applied to the US Copyright Registry to be registered as the author of the October 2008 academic paper. The evidence showed that the US Copyright Office accepted Dr Wright as the author of the paper in May 2019. There was evidence suggesting that Dr Wright considered that this was a more credible system of registration because the person seeking registration had to verify that they were the author. There was also evidence showing that the Registry had also registered another person as the author of the 2008 academic paper. That person had apparently sought registration to show that the fact of registration did not prove who was the author.
28. On 21 May 2019 there was a press release, issued on behalf of Dr Wright, confirming the registration stating "... the registration by the US Copyright Office recognised Wright as the author ... of both the White Paper and Code. This is the first Government agency recognition of Craig Wright as Satoshi Nakamoto, the creator of Bitcoin. In addition to being Bitcoin's creator, Wright is currently Chief Scientist of nChain, the global leader in advisory, research and development blockchain technologies, which focuses on massive adoption of Bitcoin in the form of Bitcoin SV". In his statement Dr Wright said "there were questions in the wider Bitcoin community about the authorship of the White paper and these questions were hindering my efforts to build a global business (both blockchain and coin) based on Bitcoin SV". There were some reports exhibited to Mr Double's statement showing that Bitcoin SV, which the evidence shows Dr Wright is associated with, had benefitted from the publication of reports about the registration of Dr Wright as author of the academic paper.
29. The evidence showed that Dr Wright was said to have featured prominently in US publications such as the New York Times, Wired magazine and the New York Post. There was evidence showing that Dr Wright had been the subject of 23 articles in eight media organisations in the UK which included the publishers of national daily newspapers.
30. Mr Double exhibited an article in the New York Times in December 2015 which referred to tax investigations by Australian authorities following reports in two outlets that identified Dr Wright "as a likely creator of the digital currency Bitcoin". The report referred to a piece in Wired which had identified Dr Wright as a possible inventor of the bitcoin currency. Wired was reported as saying "if Wright is seeking to fake his Nakamoto connection, his hoax would be practically as ambitious as Bitcoin itself". A report from Wired in 2019 stated "Either Wright invented bitcoin,

or he's a brilliant hoaxer who badly wants us to believe he did". It then set out evidence to support each scenario making comments about which scenario it considered the most likely. Another article from May 2016 referred to evidence supporting and not supporting the proposition that Dr Wright was Satoshi Nakamoto under the headline "Has the greatest mystery in tech been solved?".

31. Mr Double also exhibited an online article written on Medium.com by Dr Wright in which he emphasised that bitcoins and the entire concept of blockchains was built on law and criticised "permission-less" exchanges. Dr Wright referred to laws in the US, China and Australia in the article noting that he had put together charges sheets as a template for US, UK and Chinese authorities.
32. The press release advertised Dr Wright's appearance at the CoinGeek Toronto conference on 29-30 May 2019 in Toronto. The event was noted to feature "world leaders in blockchain scaling". A feature of the conference was said to be a special interview with Craig Wright discussing his creation of Bitcoin.
33. The evidence also showed that Dr Wright appeared at an Expo-Bitcoin International Conference in Bogata, Columbia in June 2019 with Jimmy Nguyen. Dr Wright said that Mr Nguyen was the founding President of the Bitcoin Association. Mr Double stated that Mr Nguyen was the CEO of nChain Group, but details of the corporate structure of the nChain group were not provided. Mr Double noted that Mr Nguyen had a 21 year career as an intellectual property and digital technology lawyer in California and appeared to be based in Seattle, Washington State.
34. Mr Nguyen made a witness statement in which he gave as his address the Bitcoin Association in St John's, Antigua. He said he was "Chair of the Strategic Advisory Board of "nChain Group, a group of companies which includes London-based nChain Limited, where the claimant is now Chief Scientist". Mr Nguyen said he ceased being CEO of the nChain Group at the end of 2018. He ceased practising as an attorney in the US in 2017, and lived in Seattle in December 2018, having formerly resided in California.
35. In June 2019 Dr Wright and Mr Nguyen were at a conference about Bitcoin in South America. There was a question and answer session about the vision for Satoshi Nakamoto for Latin America.
36. There was evidence that Dr Wright was the subject of an article in the London Review of Books in June 2016 headed "The Satoshi Affair". This made reference to Mr Nguyen calling the author shortly before a raid on Dr Wright's house, which appears to relate to investigations carried out by tax authorities in Australia before Dr Wright left Australia after claims had been made that he was Satoshi Nakamoto.
37. It was apparent that the Courts of California and New York in the United States would accept jurisdiction if, as he said he would, Mr Ver submitted to the jurisdiction. It was apparent from the evidence that trial courts in New York are "courts of general jurisdiction".

### **The judgment below**

38. The judge set out the parties and the details of the publications before setting out section 9 of the Defamation Act 2013. He set out the procedural history of the action from paragraphs 6 to 10 before turning to the legal framework in paragraphs 11 to 18 of the judgment. The judge referred to the submissions made by the parties about the proper approach to section 9 recording that Mr Wolanski accepted that the evidential burden was on the claimant. The judge then set out the position at common law in paragraphs 19 to 21 before turning back to section 9 in paragraphs 22 to 32 of the judgment. The judge stated that “the required assessment under s.9(2) can be approached in two stages”. These were first an assessment of the nature of the publication and its extent in each jurisdiction. The second stage was an assessment of harm to reputation in the jurisdictions in which there has been publication. The judge did record at paragraph 36 of the judgment that the assessment “is highly fact-specific. It is impossible to lay down hard rules”.
39. The judge then referred to his two stages and set out his findings on the evidence about publication in paragraphs 37 to 39 of the judgment. He set out the relevant figures and recorded that “the most significant publication, across both platforms, is in the US”, that “in most instances, publication in the UK is the second most significant” and “roughly, the publication in the US is around four times that in the UK”.
40. The judge then turned to “harm to reputation”. In paragraph 39 the judge recorded Mr Wolanski’s submissions on behalf of Dr Wright identifying the factors on which he relied. Dr Wright’s family life in the UK was set out, his intention to acquire British citizenship and to purchase a property, his working history in the UK, his studying history in the UK, and the widespread media coverage about Dr Wright in the UK. Reference was made to the article in the London Review of Books in June 2016.
41. The judge set out evidence of Dr Wright’s international profile in paragraph 40 of the judgment and referred to the publication on Dr Wright’s website. He referred to his witness statement and the evidence that he had given about his reputation in the UK and attempts to recruit staff. The judge recorded that Mr Wolanski on behalf of Dr Wright had confirmed that the effort to recruit staff to nChain was not limited to people in the UK, but would seek to attract global candidates. The judge said “it is not only the claimant’s UK reputation that has a bearing on this, but also his global reputation”. The judge referred to Dr Wright’s second witness statement and recorded Dr Wright’s statement about the speculation about the authorship of the 2008 paper hindering his efforts to building a global business based on Bitcoin SV. The judge noted that Bitcoin was a global cryptocurrency and that the bitcoin community was a global business. The judge also noted, in paragraph 46, that Mr Wolanski had confirmed that there was no other evidence as to the extent of Dr Wright’s reputation in the UK or elsewhere. The judge noted that there was “no evidence of any actual reputational harm that the claimant has suffered as a result of any of the defendant’s publications”.
42. The judge then turned to his decision. In paragraph 48 he found that “the evidence clearly demonstrates that the most substantial publication of the statements complained of is in the US”, finding that only some 7 per cent took place in England



and Wales holding that the “extent of publication in England and Wales does not demonstrate that this jurisdiction is the most appropriate place to bring the action. Still less does it do so ‘clearly’”. In paragraph 50 the judge found that the publications were not targeted at publishees in England and Wales, they were targeted at the claimant on a topic of global interest.

43. The judge then turned to harm to reputation in paragraph 51 noting that the claimant’s evidence was weak, lacked detail and was at a level of generality which was almost speculative, finding that “there is no objective evidence of any harm to reputation”. The judge stated that “the claimant has failed completely to address whether and to what extent the publications complained of have harmed his reputation in other jurisdictions”. The judge found that the claimant enjoyed a global reputation, the vast majority of which was generated before he moved to the UK. The judge said that the whole issue of damage to reputation beyond England and Wales was left completely unaddressed in Dr Wright’s evidence. The judge accepted that the evidence showed that Dr Wright was putting down roots in the UK and that would increase the reputational interests that Dr Wright had in this jurisdiction but that could not displace the global reputation that he enjoyed. The judge held that Dr Wright’s reputation in England and Wales was an inseparable segment of his reputation worldwide, mirroring the words in Lord Hoffmann’s judgment in *Berezovsky v Forbes Inc* [2000] 1 WLR 1004 at 1023A. The publications in the UK served “only to demonstrate that the claimant has a notoriety or profile that means he is of interest to readers of UK publication” which was consistent with his global reputation but did not demonstrate a reputation limited to England and Wales.
44. The judge then looked at other factors in paragraph 52 including the convenience of hearing the action in England and Wales and recording that there was nothing to suggest difficulties in getting a fair trial elsewhere.
45. Finally the judge turned to the US and said “some time – and quite some evidence, including expert legal evidence on whether a US Court would accept jurisdiction over the claim – has been devoted to the question of whether the US is in fact the most appropriate jurisdiction. I do not need to decide this issue (see [24] above)”. This was a reference back to the judge’s statement that “it is no longer sufficient to demonstrate that England and Wales is an appropriate jurisdiction. A claimant could fail to surmount the evidential hurdle in s.9(2) even if the court is unable to identify, from the other candidate jurisdictions, an alternative that is the most appropriate.” The judge found “as the claimant has declined to provide evidence of his global reputation and the harm that has been occasioned by the publication complained of, for example, in the US, I lack a basis on which to make any assessment, I only have half of the picture; ie the extent of publication in the US”. The judge noted the evidence showing Mr Ver’s consent that the claim be brought in the US and the evidence showing that there were US Courts that would accept jurisdiction where the parties have consented. The judge concluded that Dr Wright had not satisfied him that England and Wales was clearly the most appropriate place to bring his action.

### **The main submissions**

46. The appeal was heard by remote video link, and I am very grateful to Mr Wolanski QC, Mr Tomlinson QC and their respective legal teams for their helpful written and oral submissions.

47. Mr Wolanski, on behalf of Dr Wright, submitted that the judge had set Dr Wright an impossible task by requiring him to adduce evidence of actual harm to his reputation in each candidate jurisdiction, and concluding that in the absence of such evidence Dr Wright could not satisfy section 9. It was submitted that the judge was wrong to say that Dr Wright had failed to adduce objective evidence and the judge was wrong to say that Dr Wright had left unaddressed the damage to his reputation in other jurisdictions.
48. Further it was submitted that the judge had wrongly failed to carry out a comparative assessment as to whether each candidate jurisdiction was appropriate for the claim, and therefore failed to carry out the task mandated by section 9. Mr Wolanski submitted that the judge failed to take into consideration evidence which clearly demonstrated that England and Wales is the most appropriate jurisdiction for the claim.
49. Mr Tomlinson QC, on behalf of Mr Ver, submitted that the judge had taken a proper approach to the evidence in this case and that it was Dr Wright who had failed to adduce relevant evidence to permit the judge to address the section 9 issue. He also submitted that if the judge had failed to undertake the task mandated by section 9, then his decision should be upheld. This was because on a proper analysis of the evidence England and Wales was not clearly the most appropriate place in which to bring the action.
50. In addition to these points, at the start of his submissions Mr Wolanski also raised issues about what he said was a shifting burden of proof under section 9. He submitted that the burden was on the claimant when applying to get permission to serve out, and the burden then shifted to the defendant on the application to set aside service, and that there was an overlap of the burden of proof with the “good arguable case” test set out in forum non conveniens cases, see *Canada Trust v Stolzenburg* [1998] 1 WLR 547 and *Goldman Sachs International v Novo Banco SA* [2018] 1 WLR 3863 at paragraph 9. These submissions were notable by their absence from the proceedings at first instance before the judge, and, as Mr Tomlinson fairly pointed out, these arguments were not raised in any grounds of appeal. At the commencement of the hearing Flaux LJ asked Mr Wolanski whether he wanted to amend his grounds of appeal to raise these matters. Mr Wolanski did not seek permission to do so, and therefore I have not addressed those issues.

### **The common law before the enactment of section 9**

51. Both parties submitted that it was necessary to consider some of the applicable common law principles before the enactment of the Defamation Act 2013 to provide the context for section 9. This is because it is an established principle of construction that Parliament is taken to have known what the law was prior to enactment, see *Lachaux v Independent Print Ltd* [2019] USKC 27; [2019] 3 WLR 18, at paragraph 13. The different beginnings of the laws of libel and slander were set out by the Supreme Court in *In Lachaux v Independent Print* at paragraphs 4 and 5.
52. Under the common law every publication within this jurisdiction of a written defamatory statement gave rise to a claim for libel. A claim for libel was, under the common law, actionable per se, so that harm was presumed. This meant that both claimants domiciled in this jurisdiction as well as foreign claimants could sue foreign

defendants for publications of newspapers in an overseas jurisdiction, where there had, in addition to the foreign publications, been some minimal publication in this jurisdiction, see *Shevill v Presse Alliance (No 2)* [1996] AC 959. It might be noted that, absent a defendant domiciled in this jurisdiction or without a centre of interests in this jurisdiction, damages could only be awarded for the harm done to the reputation in this jurisdiction.

53. The growth of the internet, and the increasing use of the internet for news publication, increased issues for the law of libel. This was because a digital publication was published where it was downloaded to be read, see *Al Amoudi v Brisard* [2007] EWHC 1062 (QB); [2007] 1 WLR 113. This meant that there were many possible jurisdictions in which a claim for libel might be made. Further any new download would, at common law, create a new publication and cause of action.
54. The common law responded to some of the issues raised by the commencement of libel claims with minimal publications in England and Wales by the doctrine of abuse of process, as explained in *Jameel v Dow Jones* [2005] EWCA Civ 75; [2005] QB 946. It was necessary to show that “a real and substantial tort” had been committed in this jurisdiction and that “the game was worth the candle”, see *Jameel* at paragraph 69. In addition it was held that the common law required a substantial threshold of seriousness to be surmounted before a statement could be regarded as defamatory, as appeared from *Thornton v Telegraph Media Group* [2010] EWHC 1414 (QB); [2011] 1 WLR 1983. It was against this background that Parliament enacted the Defamation Act 2013.

### **Section 9 of the Defamation Act 2013**

55. Section 9 is headed “Action against a person not domiciled in the UK or a Member State etc”. I have set out sections 9(1) to (3) below. I have not set out sections 9(4) and (5) because they relate to domicile and the definitions of the Brussels Convention and Lugano Convention which are not in issue on this appeal.

“9.— Action against a person not domiciled in the UK or a Member State etc

(1) This section applies to an action for defamation against a person who is not domiciled—

(a) in the United Kingdom;

(b) in another Member State; or

(c) in a state which is for the time being a contracting party to the Lugano Convention.

(2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.

(3) The references in subsection (2) to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of.

...”

56. Section 9 currently applies only to cases where the defendant to the claim is not domiciled either in the UK or in an EU member state or a state which is party to the Lugano Convention. However section 9 will be amended from December 2020 by regulation 69 of the Civil Jurisdiction and Judgments (Amendment)(EU Exit) Regulations 2019/479. Section 9 will then apply to cases where the defendant to the claim is not domiciled in the UK, so the reach of section 9 will increase.

### **The approach to section 9**

57. The Defamation Act 2013 and its amendments to the common law were considered by the Supreme Court in *Lachaux v Independent Print*. However the focus of the appeal in *Lachaux v Independent Print* was on the meaning of serious harm in section 1 and section 9 was not an issue in that appeal.
58. Section 9 of the Defamation Act has been considered at first instance on a number of occasions, including the decision of the judge in this case. These decision include *Ahuja v Politika Novine I Magazini DOO and others* [2015] EWHC 3380 (QB); [2016] 1 WLR 1414, *Huda v Wells* [2017] EWHC 2553 (QB); [2018] EMLR 7, and *Sadik v Sadik* [2019] EWHC 2717 (QB). In paragraphs 31 and 32 of *Ahuja* Sir Michael Tugendhat had set out extracts from the explanatory notes of the Act and referred to commentaries in various textbooks. It is apparent that although the explanatory notes state that the section was aimed to address the issue of “libel tourism” (which was said to be a term used to apply where cases with a tenuous link to England and Wales are brought in this jurisdiction), the effect of section 9 is of a wider effect because it is dependent only on the domicile of the defendant, and not the claimant. It is plain that a person domiciled in England and Wales may find it easier to show that the jurisdiction of England and Wales is clearly the most appropriate jurisdiction to bring the claim, but the position may not be so straightforward with persons who have moved to this jurisdiction or who have a global reputation.
59. In *Ahuja* Sir Michael Tugendhat concluded that a Court would consider all the jurisdictions where the defamatory statement had been published in order to determine whether the domestic jurisdiction is clearly the most appropriate place to bring the action, see paragraphs 31 and 41 of *Ahuja*. It was apparent at the conclusion of the oral submissions on this appeal that neither party was contending for a different approach from that taken in *Ahuja*. This is not surprising because the formulation in *Ahuja* is a statement of the statutory provision, which uses ordinary language, to describe the Court’s task when deciding an issue under section 9.
60. In these circumstances in my judgment section 9 requires that, where the defendant is not domiciled in the UK (or at present a Member state or a party to the Lugano Convention), the party bringing the claim will need to satisfy a Court, on the balance of probabilities, that “of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring

an action in respect of the statement”. This will require the Court to assess a number of different factors.

61. Relevant factors will include the best evidence available to show all the “places”, which in this context means jurisdictions, in which the relevant statement has been published, see *Ahuja* at paragraph 31. It might be noted that the “statement” is defined in sub-section (3) to include “any statement which conveys the same, or substantially the same, imputation as the statement complained of”.
62. The number of times on which the statement has been published in each jurisdiction will be a relevant factor. For example if the hard copy circulation of a newspaper is 90,000 in Portugal and 136 in England and Wales, that is likely to be a very material factor in the assessment of the most appropriate place to bring the action, compare *Sobrinho v Impresa Publishing SA* [2016] EWHC 66 (QB); [2016] EMLR 12. This reflects the suggestion made in paragraph 66 of the Explanatory Notes to the Defamation Act 2013.
63. Another relevant factor for the Court to consider will be damage to reputation. As the tort of libel is critically concerned with damage to reputation and, since the Defamation Act 2013 “serious harm” to reputation, the Court “would wish to take into account such matters as the amount of damage to the claimant’s reputation in England and Wales compared with elsewhere”, see *Ahuja* at paragraph 32. It is well known that it can be difficult to establish harm to reputation. This is because of the obvious difficulties of getting witnesses to say that they read the words and thought badly of the claimant, if only because claimants will have an understandable desire not to spread the contents of the article complained of by asking persons if they have read it and what they think of the claimant, and because persons who think badly of the claimant are not likely to co-operate in providing evidence. However it is not impossible to obtain such evidence, see *Lachaux v Independent Print*, and Courts are able, as in all cases, to draw inferences based on the admitted evidence.
64. It is possible that a publication which is targeted at particular readers in England and Wales may make England and Wales “clearly the most appropriate jurisdiction”. This is because such a targeted publication might cause the most serious harm to reputation in England and Wales, but all will depend on the evidence.
65. However there are other relevant factors for a Court to consider when making a decision under section 9. These factors are likely to include the availability of fair judicial processes in the other jurisdictions in which publication occurred. The available remedies from the Courts of the other jurisdictions may be relevant, as may be the costs of pursuing proceedings in each possible jurisdiction. Other factors that might impact on access to justice, for example language barriers, can be relevant. The location of likely witnesses is another feature that may be relevant. This list of factors is not exhaustive because the relevant multifactorial question to be answered by the Court is whether it can be shown that England and Wales is clearly the most appropriate jurisdiction in which to bring the action. This will be fact specific but it is likely to require the Court to make the best assessment that it can on the evidence whether any competing jurisdiction is an appropriate place to bring this claim.

### **The judge's approach to section 9 (issue one)**

66. As appears from the summary of the judge's judgment the judge stated that section 9 should be approached in two stages being the nature and extent of its publication in each jurisdiction and the evidence of harm in each jurisdiction. The judge noted the greater number of publications in the US and found that Dr Wright had a global reputation but also that Dr Wright had failed completely to address whether and to what extent the publications had harmed his reputation in other jurisdictions.
67. As appears from paragraphs 61 to 63 above I agree with the judge that both the nature and extent of publication, and damage to reputation are important relevant factors to consider, and in many cases these may be the decisive factors. However setting out a two stage test is unlikely to assist in many cases. This is because it is an intermediate step to be performed by the Court, and adds a gloss to the statutory question. It is therefore likely to add to the complexity of the Court's task. Further it is not clear how the first two stages set out by the judge relate to other relevant factors. The statutory question remains only whether it can be shown that England and Wales is clearly the most appropriate jurisdiction in which to bring this action.
68. As appears from paragraphs 64 to 65 above other factors in addition to the two stages identified by the judge may be relevant. It is right to note that the judge did consider under his heading "other factors" the convenience of hearing the action in England and Wales. However when the judge turned to consider whether the US was the most appropriate jurisdiction he said in terms "I do not need to resolve this issue", and referred back to paragraph 24 of his judgment where he noted that a claimant might fail to surmount the evidential hurdle in section 9 even if the Court is unable to identify, from other candidate jurisdictions, an alternative that is the most appropriate. The judge then highlighted the fact that Dr Wright had failed to provide evidence of the extent of his global reputation and the harm caused to it in the US. The judge concluded that Dr Wright had not satisfied him that England and Wales was clearly the most appropriate jurisdiction to bring the claim.
69. I agree that in some cases a judge may be unable to say which is the most appropriate jurisdiction in which to bring a claim. It is also clear that the decisive issue is whether England and Wales is "clearly the most appropriate" jurisdiction in which to bring the claim. However I agree with Mr Wolanski that the judge had to confront Dr Wright's evidence that he had only visited the US for two and a half days in the last four years, and his evidence that the vast majority of his business peers were in the UK. I also accept Mr Wolanski's submission that it was possible to make an assessment of whether the US was the most appropriate jurisdiction in which to bring this claim when considering the relevant factors. It is therefore necessary for this court to consider for itself whether England and Wales is clearly the most appropriate jurisdiction in which to bring this claim, and I therefore turn to the second issue on appeal.

### **England and Wales is not clearly the most appropriate jurisdiction (issue two)**

70. Mr Wolanski accepted that the judge had listed Dr Wright's connections to this jurisdiction in paragraph 39 of the judgment but submitted that the evidence showed

that England and Wales was clearly the most appropriate jurisdiction. Mr Tomlinson referred to the evidence showing Dr Wright's links with the US and the complete absence of any evidence about his reputation in the US.

71. In my judgment the evidence shows that England and Wales was not "clearly the most appropriate" jurisdiction to hear this claim. This is for the reasons set out below which are based on an assessment of the relevant factors.
72. First the evidence shows that there were about four times as many publications of the YouTube channel and tweets in the US as there were in the UK. This reflects Mr Ver's evidence to the effect that the reach of the YouTube Channel and Twitter account was centred on the United States. This evidence strongly suggests that a state in the US is likely to be the most appropriate jurisdiction in which to bring the claim.
73. Secondly the judge's finding that Dr Wright had a global reputation was clearly established by the evidence. This showed that Dr Wright spoke at international conferences on cryptocurrencies from Asia to South and North America. He described himself as "an Australian/Antiguan computer scientist, businessman and inventor who challenges the world with visionary ideas". Dr Wright's evidence showed that he made submissions to regulators interested in cryptocurrencies in the US, Australia, UK, China, Singapore and Uzbekistan. Bitcoin is a global cryptocurrency. The existence of a global reputation shows that Dr Wright's reputation is just as likely to be affected in other jurisdictions where publication took place, as it is in England and Wales.
74. Thirdly the evidence about other internet, newspaper and periodical publications which were before us (and many of the publications were not exhibited in the evidence below and one of the exhibited publications had been removed from the appeal bundles) showed that there was a global issue about whether Dr Wright was the inventor of Bitcoin, and that Dr Wright had registered himself as the copyright owner of the 2008 academic paper in the US Copyright Registry. Dr Wright had issued a press release about this stating that the registration by the US Copyright Office recognised Dr Wright as the author of the 2008 paper and code. Dr Wright said that the speculation about the 2008 academic paper was hindering his efforts to build a global business based on Bitcoin SV. All of this relates to a global reputation, part relying on a specific action taken in the US, rather than any specific reputation in England and Wales. The registration by Dr Wright in the US with the relevant press release about the registration supports the proposition that a state in the US is an appropriate jurisdiction in which this claim can be brought.
75. Fourthly although Dr Wright gave evidence that the majority of his business peers were in the UK he provided no details about these persons. On the other hand the evidence showed that Dr Wright's former business associate David Kleiman had lived in Florida, US, and that the estate of David Kleiman and Dr Wright were in a substantial dispute in the courts of Florida about the entitlement to Bitcoins. The evidence also showed that Dr Wright spoke at international conferences with Jimmy Nguyen who now lives in Seattle, Washington State, US and who had practised as a patents attorney for 17 years in California, US. This evidence about Dr Wright's business relationships, which is the most that is available on the evidence before the Court, strongly suggests that Dr Wright's most important relationships were and are in the US.

76. Fifthly although Dr Wright gave evidence that he was employed by nChain Limited, a UK company, the evidence showed that nChain described itself as the global leader in advisory, research and development blockchain technologies. Further the evidence showed that there was a nChain group of companies of which Mr Nguyen, who lives in the US, had been the CEO until recently. Mr Nguyen was still the chair of the Strategic Advisory Board. The limited evidence about nChain from Mr Nguyen suggested that nChain was a group of companies based in more than one jurisdiction. Dr Wright specifically referred to his concerns that the relevant publications might undermine his efforts to recruit those who had obtained doctorates in mathematics, but there was no evidence showing that the concern was justified. Further Mr Wolanski had confirmed to the judge in the hearing below that nChain's efforts to recruit staff was not limited to the UK.
77. Sixthly the judge was right to accept Dr Wright's evidence about his links to this jurisdiction, summarised in paragraph 39 of the judgment below, but this evidence was not inconsistent with Dr Wright's global reputation, or specific links to the US through Mr Kleiman, Mr Nguyen, and the publicity surrounding his registration of the 2008 academic paper with the US Copyright Office. The evidence about the reputation established by Dr Wright in this jurisdiction was rightly described by the judge, on the evidence in this case, as a segment of his global reputation.
78. Seventhly the evidence established that the Courts in the US would have jurisdiction over the claim made by Dr Wright against Mr Ver, who had consented to the jurisdiction of the US Courts. Although the evidence did not address the specifics of remedies available to Dr Wright in each respective state in the US beyond the statement that New York was a Court of "general jurisdiction", there was nothing in the evidence to suggest that Dr Wright would not be able to obtain damages to vindicate his reputation in any state for all the relevant publications in the US. Although Mr Wolanski attempted to sub-divide the publications in the US according to each individual state it was not apparent that this point had been taken before the judge, but more importantly there was no evidence suggesting that any state in the US which would accept jurisdiction would not be able to provide Dr Wright with an adequate remedy for the totality of the publications in the US. There was no evidence showing that Dr Wright would have difficulties in obtaining access to justice in any state in the US beyond his unexplained hearsay assertion that he had been told that it would be difficult.
79. Eighthly there was no evidence that any relevant witness would have difficulty in providing evidence in any state in the US, but it might fairly be noted that neither party had provided details of relevant witnesses or made any effort on the evidence to identify what were the likely issues.
80. In all these circumstances in my judgment, on the evidence before the judge, a state in the US which would accept jurisdiction over this claim, which includes California, is the most appropriate jurisdiction in which to bring this claim.
81. For the detailed reasons set out above, and in agreement with the judge, I find that England and Wales is not clearly the most appropriate place to bring this action for defamation. I would therefore dismiss this appeal.



**Lord Justice Popplewell:**

82. I agree.

**Lord Justice Flaux:**

83. I also agree.