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Case No: QB-2019-001430

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2019

Before :

THE HONOURABLE MR JUSTICE NICKLIN

Between :

Craig Wright

Claimant

- and -

Roger Ver

Defendant

Adam Wolanski QC and Lily Walker-Parr (instructed by SCA ONTIER LLP)
for the Claimant
Hugh Tomlinson QC (instructed by Brett Wilson LLP) for the Defendant

Hearing date: 29 July 2019

Approved Judgment

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.

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THE HONOURABLE MR JUSTICE NICKLIN

The Honourable Mr Justice Nicklin :

1. This is a claim for libel. The Claimant is a computer scientist with a particular interest in cryptocurrencies. He is a national of Australia, who has lived in the United Kingdom since December 2015. Bitcoin is a cryptocurrency. The Defendant is a bitcoin investor. He also describes himself as a commentator within the bitcoin and cryptocurrency industries who is currently involved in several bitcoin related projects. The Defendant was born in the United States, in 1979, and moved to Japan in 2005. Since 2014 he has been domiciled in, and a citizen of, St Kitts & Nevis. Satoshi Nakamoto is the name used by the pseudonymous person(s) who developed bitcoin.
2. The Claimant complains that he has been libelled in the following publications:
 - i) a video posted by the Defendant to a YouTube account held by bitcoin.com on or around 15 April 2019 (“the YouTube Video”);
 - ii) a tweet containing the YouTube Video which was posted on the Defendant’s Twitter account (“the Twitter Account”) on 3 May 2019 (“the Twitter Posting”); and
 - iii) a reply to the Twitter Posting which was also posted on Twitter on 3 May 2019 by a third party (“the BKKShadow Posting”).
3. For the purposes of the present application I need not set out the contents of the videos about which the Claimant complains. It suffices that I set out the defamatory innuendo meaning that the Claimant says these publications bear: *“The Claimant had fraudulently claimed to be Satoshi Nakamoto, that is to say the person, or one of the group of people, who developed bitcoin.”*
4. The principal issue I have to determine on the present application is whether the Court has jurisdiction over the claim. Section 9 of the Defamation Act 2013 provides (so far as material):

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.
- (4) For the purposes of this section—
 - (a) a person is domiciled in the United Kingdom or in another Member State if the person is domiciled there for the purposes of the Brussels Regulation;
 - (b) a person is domiciled in a state which is a contracting party to the Lugano Convention if the person is domiciled in the state for the purposes of that Convention...
5. It is common ground that the Defendant is not domiciled in any of the places identified in s.9(1). Therefore, this Court does not have jurisdiction over the Claimant's claim for libel unless the Court is satisfied that of all the places that the statements complained of have been published, England and Wales is clearly the most appropriate place in which to bring the claim.

Procedural history

6. The Claimant sent a letter before action to the Defendant on 1 May 2019, seeking a response by 8 May 2019. However, on 2 May 2019, discovering the Defendant was visiting London, the Claimant issued a Claim Form and arranged for it to be served personally on him (CPR Part 6.5(2)). At that stage, the Claim Form made a claim for libel solely in relation to the YouTube Video. Service of the Claim Form on the Defendant whilst he was within the jurisdiction is important; it meant that the Claimant did not require the Court's permission to serve the proceedings.
7. On 16 May 2019, the Claimant made an application, without notice to the Defendant, for an order granting him permission:
 - i) pursuant to CPR Part 17.2(b) to amend the Claim Form to add further claims in respect of the Twitter Posting and the BKKShadow Posting;
 - ii) pursuant to CPR Part 6.38(1)¹, to serve on the Defendant the Particulars of Claim and any further documents in the proceedings "*out of the jurisdiction in Japan where the Defendant is domiciled*"; and
 - iii) pursuant to CPR Part 6.15 and 6.27, to serve the Amended Claim Form and Particulars of Claim using an alternative method, namely email.
8. There was a hearing before Master Thornett that same day, at which the Claimant was represented by junior Counsel and a representative of his solicitors. The Master granted the Claimant permission to amend the Claim Form and, pursuant to CPR 6.15(1), permitted the Claimant to serve the Amended Claim Form, the Particulars of Claim and his Order by email to two bitcoin.com email addresses. The Master's Order

¹ CPR Part 6.38 enables the Court to grant permission for service of documents, other than the Claim Form, out of the jurisdiction. CPR Parts 6.36 and 6.37 provide the rules governing service of the Claim Form out of the jurisdiction.

recited that, although the application had been made without notice, he had been satisfied that the Defendant was likely to be aware of the application because of an email sent on 15 May 2019. The order made no reference to the Defendant being outside the jurisdiction. It contained the usual provision enabling the Defendant to apply to vary or discharge the Order pursuant to CPR Part 23.10.

9. On 13 June 2019, and within the time for doing so under Master Thornett’s order, the Defendant filed an Acknowledgement of Service indicating that he intended to contest the Court’s jurisdiction. In the accompanying letter from his solicitors, the Defendant indicated that the basis of the challenge was lack of jurisdiction under s.9 based on the Defendant’s domicile. Following further correspondence between the parties, on 27 June 2019, the Defendant made the Application that is before the Court today, for a declaration that the Court did and does not have jurisdiction over the claim and to set aside Master Thornett’s Order on the basis of material non-disclosure, namely the failure to draw the Master’s attention to s.9 Defamation Act 2013 (“the Set-Aside Application”). I deal with the Set-Aside Application below ([56]-[60]).
10. A substantial amount of evidence has been filed by both parties. There are two statements each from the Defendant and the Claimant, and several other witness statements. Principally, this evidence concerns the parties’ connections with this (and other) jurisdictions, the extent of publication in England and Wales (compared with other jurisdictions) and the importance to the Claimant of his reputation in this jurisdiction.

Legal Framework

11. I have set out the terms of s.9 above. The terms and effect of the section have only received direct consideration in one earlier case: *Ahuja -v- Politika Novine I Magazini DOO & others* [2016] 1 WLR 1414. I made some observations on s.9 in *Huda -v- Wells* [2018] EMLR 7 [84]-[85], but the case was decided on other grounds and so they are strictly *obiter*. They also must be understood in the context of that particular case.
12. The Explanatory Notes to the Defamation Act 2013 state, in relation to s.9:
 - “65. This section aims to address the issue of ‘libel tourism’ (a term which is used to apply where cases with a tenuous link to England and Wales are brought in this jurisdiction). Subsection (1) focuses the provision on cases where an action is brought against a person who is not domiciled in the UK, an EU Member State or a state which is a party to the Lugano Convention. This is in order to avoid conflict with European jurisdictional rules (in particular the Brussels Regulation on jurisdictional matters).
 66. Subsection (2) provides that a court does not have jurisdiction to hear and determine an action to which the section applies unless it 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. This means that in cases where a statement has been published in this jurisdiction and also abroad the court will be required to consider the overall global picture to consider where it would be most appropriate for a claim to be heard. It is

intended that this will overcome the problem of courts readily accepting jurisdiction simply because a claimant frames their claim so as to focus on damage which has occurred in this jurisdiction only. This would mean that, for example, if a statement was published 100,000 times in Australia and only 5,000 times in England that would be a good basis on which to conclude that the most appropriate jurisdiction in which to bring an action in respect of the statement was Australia rather than England. There will however be a range of factors which the court may wish to take into account including, for example, the amount of damage to the claimant's reputation in this jurisdiction compared to elsewhere, the extent to which the publication was targeted at a readership in this jurisdiction compared to elsewhere, and whether there is reason to think that the claimant would not receive a fair hearing elsewhere."

13. Sir Michael Tugendhat considered the reference to 'libel tourism' in the *Explanatory Notes* in *Ahuja* [26]:

"... [the words 'libel tourism'] do not identify the mischief which the section is to remedy. It is not suggested in the present case that the claimant is in any sense a 'tourist', nor that his links to England and Wales are tenuous, and yet the section applies to him. The section makes no reference to different categories of claimant, or to any specific link to England that a claimant might have or lack. It applies as much to a claimant who has never resided in England as to one who is resident or domiciled here..."

14. He did not accept the broad submission that, in order to give effect to the section in a way that was compatible with a claimant's right of access to a Court under Article 6, s.9 had to be read as if it contained the additional underlined words: "*of all the places in which the statement complained of has been published, which may reasonably be considered appropriate*" [35], [41]. The Judge considered that Article 6 might be engaged, in more limited circumstances, where a claimant confronted an enormous task to put before the Court evidence of the extent of publication in multiple jurisdictions [39]-[40]:

"The Internet has had the effect that many ordinary people are defamed in publications accessible to readers all over the world. And some ordinary (and otherwise very private) people are the subject of defamations which, for one reason or another, are in fact read or viewed (on media such as YouTube) by thousands or even millions of people abroad. And I would not exclude the possibility that there could be cases where, to require a claimant to put before the court evidence relating to all the jurisdictions where the defamatory statement has been published, might interfere with the claimant's right of access to the court. But that is not this case... [I]f I had thought that there was any undue or impossible requirement being imposed on the claimant in this case, I would have taken into consideration, in deciding whether England and Wales is clearly the most appropriate place in which to bring an action, the claimant's right of access to the court."

Submissions

15. Mr Tomlinson QC submits that there are two important points about s.9:

- i) First, its operation depends on where the defendant is domiciled – not on where they are resident or contingently present. In other words, the fact that a defendant to whom the section applies is or was in England and Wales, and could be served personally, is irrelevant.
 - ii) Second, the burden of s.9(2) is upon the claimant to demonstrate that England and Wales is clearly the most appropriate place to bring the action. There is no burden on the defendant to come up with alternative jurisdictions, nor is the Court obliged to identify the most appropriate jurisdiction if the claimant fails to establish that it is England and Wales.
16. Mr Tomlinson QC contends that the following principles can be derived from *Ahuja* and *Huda*:
- i) If a claimant fails to show that England and Wales is “*clearly the most appropriate place*” to bring an action, the Court does not have jurisdiction to hear the claim. There is no discretion.
 - ii) The requirement is strict:

“... the effect of s.9 will be to oblige the court to consider all the jurisdictions where the defamatory statement has been published, in order to determine whether the domestic jurisdiction is clearly the most appropriate place”: a passage from *Gatley* at §24.29, approved in *Ahuja* at [31], [41] and [70].
 - iii) Even if this an “*immense and complex*” task, it is highly unlikely to constitute an interference with a claimant’s right of access to the Court, particularly where the claimant is of substantial means: *Ahuja* [40].
 - iv) Similarly, a claimant with a global reputation must

“... put before the court the evidence of the harm to their global reputations which enables the court to be 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”: *Ahuja* [71].
 - v) This is because such damage must be evaluated on a jurisdiction-by-jurisdiction basis: *Ahuja* [39].
 - vi) In addition, a Court will take into account factors including: (a) the extent to which publication was targeted at a readership in England and Wales compared with elsewhere; (b) whether there was reason to think that the claimant would not receive a fair hearing elsewhere; (c) the convenience of witnesses and the relative expense of suing in different jurisdictions: *Ahuja* [39]; (d) the value of any vindication that could be obtained elsewhere: *Huda* [85(v)].
 - vii) As a jurisdictional requirement, s.9 must be considered prior to any question of service:

“In a s.9 case, the Court does not get to the stage of considering whether to grant permission to serve out (and the questions of discretion that would apply to that decision) unless s.9(2) is satisfied. England & Wales has to be ‘clearly the most appropriate place in which to bring an action’ before the English Court can have jurisdiction over the claim”: *Huda* [21].

17. Mr Wolanski QC accepts that the evidential burden is on the Claimant and that the Court must consider all the jurisdictions in which the defamatory statement has been published when deciding whether England and Wales is clearly the most appropriate. He argues that *Ahuja* and *Huda* are authorities for the following propositions:

- i) The task of the Court is to identify the forum in which the case can be suitably tried for the interests of all parties and for the ends of justice: *Huda* [18(i)].
- ii) The Court should consider what is the natural forum for the pursuit of the claims, in the sense of being the jurisdiction with which the claims have their most real and substantial connection: *Huda* [18(iv)], citing *Spiliada Maritime Corpn -v- Cansulex Ltd* [1987] AC 460, 478).
- iii) The jurisdiction in which a tort has been committed is *prima facie* the natural forum for the determination of the dispute: *Huda* [18(v)], citing *Berezovsky -v- Michaels* [2000] 1 WLR 1004 at 1013D and 1014E.
- iv) Where publication has taken place on the internet, and therefore is accessible by a large audience abroad, it might interfere with the right of access to the Court to require the claimant to put before the Court evidence relating to all the jurisdictions where the defamatory statement has been published. In assessing whether this is the case, the Court may have regard to the means of the claimant: *Ahuja* [39].
- v) The issue of jurisdiction is not merely a numbers game: “*the extent of publication in different jurisdictions may have little bearing on where the claimant's reputation mainly lies and on where that reputation has been most seriously damaged*”: *Ahuja* [31].
- vi) Relevant factors are likely to include the extent of damage to a claimant's reputation in England and Wales compared with elsewhere; the extent to which publication was targeted at a readership in England and Wales compared with elsewhere; the convenience of witnesses; and the relative expense of suing in different jurisdictions: *Ahuja* [31]. In relation to ‘targeting’, Mr Wolanski QC has referred me to the decision in *Sloutsker -v- Romanova* [2015] EWHC 545 (QB); [2015] 2 Costs LR 321, in which Warby J said [44]:

“In [*King -v- Lewis* [2005] EMLR 4 [34]], the Court of Appeal rejected ‘out of hand’ a submission that the court should take into account whether or not the defendant had ‘targeted’ this jurisdiction, concluding that this was too subjective and nebulous a criterion, liable to manipulation and ‘much more likely to diminish than enhance the interests of justice’”.

- vii) Claimants resident in the jurisdiction are more likely to be able to surmount the threshold than foreign claimants, although if such a claimant spends his

working life abroad, and enjoys reputations in one or more countries abroad as significant as his reputations in England and Wales, he might be in a different position: *Ahuja* [31]–[32];

18. Mr Wolanski QC further submits that publication on the internet gives rise to additional considerations. In *Sloutsker* (a case that did not concern s.9), Warby J stated [43]:

“As the law stands, the same principles apply to internet publication as apply to hard copy publication, except that the court's discretion in an internet context ‘will tend to be more open-textured than otherwise’: *King -v- Lewis*... It is clear from the context in which Lord Woolf made that remark that he intended it to be taken as an indication that the court should not be shy of allowing foreigners who publish via the internet to be sued in this jurisdiction, given that such publishers will have chosen to disseminate their information via a global medium. This emerges not least, but not only, from Lord Woolf's citation at [29] of the conclusion of the High Court of Australia in *Gutnick -v- Dow Jones* [2002] HCA 56 [192] that:

‘If a publisher publishes in a multiplicity of jurisdictions it should understand, and must accept, that it runs the risk of liability in those jurisdictions in which the publication is not lawful and inflicts damage.’”

The position at common law

19. Prior to s.9 Defamation Act 2013 the common law position in relation to jurisdiction was summarised by Lord Phillips MR in *Jameel -v- Dow Jones & Co Inc* [2005] QB 946:

[49] Where there is a worldwide publication of an allegedly defamatory article, whether in hard copy form or on the Internet, difficult issues of jurisdiction may occur. Where the claim is governed by the Brussels and Lugano Conventions, as scheduled to the Civil Jurisdiction and Judgments Act 1982, and Council Regulation 44/2001/EC of 22 December 2000, a claim for all publications can be brought in the jurisdiction where the defendant is established or individually in each member state where publication has taken place in respect only of the publication within that member state: see *Shevill -v- Presse Alliance SA* [1995] 2 AC 18. If the latter alternative is adopted, English jurisdiction in respect of the publication in England cannot be challenged on the ground that England is not the most convenient forum. Where the Conventions do not apply, a claimant can obtain permission to serve a foreign publisher out of the jurisdiction in respect of a publication in England, pursuant to CPR r 6.20(8). In those circumstances the claim will be limited to the publications within the jurisdiction. Furthermore, the defendant can apply to have service set aside on the ground that there is an alternative jurisdiction ‘in which the case may be tried more suitably for the interests of all the parties and the ends of justice’: see *Spiliada Maritime Corpn -v- Cansulex Ltd* [1987] AC 460, 476.

[50] It is in the context of an application to set aside service outside the jurisdiction on such grounds that the question of whether ‘a real and

substantial tort has been committed within the jurisdiction' has been relevant. In *Kroch -v- Rossell et Cie Société des Personnes à Responsabilité Ltd* [1937] 1 All ER 725 the plaintiff brought libel proceedings against the publishers of a French newspaper and a Belgian newspaper. He obtained permission to serve each defendant out of the jurisdiction on the ground that a small number of copies of each newspaper had been published in England. The vast bulk of the publications had been in France and Germany. The defendants applied successfully to have the order giving permission to serve out set aside. Slessor LJ remarked, at p.729:

'in no sense can it be said that there is any substantial importation of these papers in England, or that the libel which is said to affect the plaintiff in England is anything but a very minor incident of the substantial publication in France.'

Scott LJ added, at p.732:

'I think it would be ridiculous and fundamentally wrong to have these two cases tried in this country, on a very small and technical publication, when the real grievance of the plaintiff is a grievance against the widespread publication of the two papers in the respective countries where they are published.'

[51] More recently, in *Chadha -v- Dow Jones & Co Inc* [1999] EMLR 724, 732 Roch LJ stated:

'In my judgment once it is established that there has been an "English tort" that is to say that there has been a significant publication of prima facie defamatory matter concerning the plaintiff within the jurisdiction, the English courts have jurisdiction with regard to that English tort. Where the perpetrator of the tort is not within the jurisdiction but is abroad, then leave to serve process abroad under Order 11 is required and the fundamental principle identified by the House of Lords in *Spiliada*... If there is a substantial complaint with respect to the English tort, having regard to the scale of the publication within the jurisdiction and the extent to which the plaintiff has connections with and a reputation to protect in this country as against the inconvenience to the defendant in being brought here to answer for his alleged wrongdoing then service of the writ abroad is to be ordered.'

20. In *King -v- Lewis* [2005] EMLR 4, the Court of Appeal identified three strands in the common law (excluding the issue of juridical advantage) as to the proper forum for defamation claims:

- i) There exists an initial presumption that the natural or appropriate *forum* for trial of the dispute will be the courts of the place where the tort is committed; a principle not limited to defamation: [24]; *The Albaforth* [1984] 2 Lloyd's Law Reports 91, 96; *Berezovsky -v- Michaels* [2000] 1 WLR 1004, 1014E.
- ii) This presumption is only a starting-point. The Court is not required to disregard evidence that publication has taken place in other jurisdictions. On the contrary the existence and extent of that publication will always be a

relevant factor. The weight to be given to it will vary from case to case, having regard to the claimant's connection with England and Wales. The more tenuous the connection with this country, and the more substantial any publication abroad, the harder it will be to demonstrate that England and Wales is the most appropriate forum: [25]-[27]; *Berezovsky*, 1032D-E.

- iii) Although the House of Lords, in *Berezovsky* (at p.1012), had rejected a 'single-publication rule' for internet publication (see discussion in *Gutnick -v- Dow Jones (2002) HCA 56* [29(ff)].) - the proposition that the Court should treat the entire international publication across multiple jurisdictions as if it gave rise to one cause of action and to assess whether it has been clearly proved that this action would best be tried in England and Wales - the Court still needed to have regard to the 'global picture': [28]. Where there is publication in just two jurisdictions, the *Albaforth* starting-point may remain very meaningful. But in relation to internet libel, bearing in mind that each publication constitutes a separate tort, a defendant who publishes on the internet may find himself at risk of multiple actions in different jurisdictions. In such cases, the place where the tort is committed ceases to be a potent limiting factor, cf. *Gutnick -v- Dow Jones (2002) HCA 56* [39], [191]-[192]. The Court must still ascertain the most appropriate *forum* and the parties' connections with the relevant jurisdiction(s) will still have to be considered. In an internet case the Court's discretion will tend to be more open-textured than otherwise; but every case will depend upon its own circumstances.

21. The Court's task is to assess the relative importance of all the factors: including the place of the tort, the parties' respective connections with the relevant jurisdictions and the global nature of the publication. This is not an application of legal rules. They are matters which will inform the judge who ultimately must decide where the balance of convenience lies: *King* [36].

s.9 Defamation Act 2013

22. The burden of demonstrating that England and Wales is clearly the most appropriate place to bring an action for defamation lies on the claimant.
23. The task for the Court is an assessment of evidence, not an exercise of discretion.
24. The threshold is clear: the Court must be satisfied that England and Wales is *clearly the most* appropriate jurisdiction in which to bring a libel claim where there has been multi-jurisdiction publication. 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.
25. The section does not list the factors that should be considered when deciding whether the claimant has demonstrated that England and Wales is "*clearly the most appropriate place*" to bring an action for defamation.
26. The only consideration to which express reference is made in the section is the extent of publication in England and Wales compared to other jurisdictions: that I derive

from the words “*of all the places in which the statement complained of has been published*”. Indeed, s.9(3) includes in this assessment “*any statement which conveys the same, or substantially the same, imputation*”. Consequently, the Court must assess the ‘global position’ in terms of publication: **Ahuja** [31].

27. The section does not discriminate between those claimants domiciled/resident in England and Wales and those domiciled/resident elsewhere. A claimant who lives and works (or has a substantial reputation) in England and Wales *may* find it easier to discharge the burden of showing that England and Wales is clearly the most appropriate jurisdiction (see discussion in [31(ii)] below), but the terms of the section do not justify any evidential presumption to that effect.
28. As made clear in the *Explanatory Notes*, the extent of publication in each jurisdiction is likely to be a weighty factor when making the assessment of whether England and Wales is clearly the most appropriate place to bring the claim. As a rough starting point, the more extensive the publication in a jurisdiction, the greater the damage to reputation in that jurisdiction.
29. However, “*the extent of publication in different jurisdictions may have little bearing on where the claimant’s reputation mainly lies and on where that reputation has been most seriously damaged*”: **Ahuja** [31]. Equally, some individuals may enjoy reputations in one or more countries abroad that are at least as significant as their reputations in their ‘home’ jurisdiction; for example, those who have achieved prominence in business, finance, government, academic life, media and entertainment and sport: **Ahuja** [32].
30. Assessment of harm to reputation has never been just a ‘numbers game’: “*one well-directed arrow [may] hit the bull’s eye of reputation*” and cause more damage than indiscriminate firing: **King -v- Grundon [2012] EWHC 2719 (QB)** [40] *per* Sharp J. That principle applies equally to cross-border libels. Therefore, as well as assessing the extent of publication in the relevant jurisdictions:

“...the Court must assess the amount of damage to the claimant’s reputation in England & Wales compared with elsewhere and the extent to which the publication was targeted at readership in England & Wales compared with elsewhere”: **Ahuja** [31];

And claimants must “... put before the court the evidence of the harm to their global reputations which enables the court to be 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”: **Ahuja** [71].

31. The concept of ‘targeting’, perhaps needs further elaboration. In **King -v- Lewis**, Court of Appeal doubted the relevance of ‘targeting’ in internet publication cases [34]:

“... it makes little sense to distinguish between one jurisdiction and another in order to decide which the defendant has ‘targeted’, when in truth he has ‘targeted’ every jurisdiction where his text may be downloaded. Further, if the exercise required the ascertainment of what it was the defendant subjectively intended to ‘target’, it would in our judgment be liable to manipulation and

uncertainty, and much more likely to diminish than enhance the interests of justice.”

See also *Sloutsker* (quoted in [17(vi)] above).

32. “Targeting” may be a misnomer for the concept that I think does have a potential bearing. The website of a UK newspaper will be accessible all over the globe, but the content may recognisably be ‘targeted’, predominantly, even if not exclusively, at a UK audience. For some websites or online publication, the fact that the content is available in other jurisdictions is just an incidental feature of the internet. A local online petition to install more street lights in Peckham will be available to the denizens of Caracas, even if it was of little or no interest to them. But, again, this is fact-sensitive. An article published on such a UK newspaper’s website might be read, in total, by more people outside England and Wales than within the jurisdiction. I understand Sir Michael Tugendhat, in *Ahuja* [31], to be saying simply that, in this sense, the publication may be characterised as being ‘targeted’ and that is likely to be a relevant factor in determining whether England and Wales is clearly the most appropriate place to bring an defamation action. That this would be a relevant factor to be considered could hardly be controversial.
33. Having regard to these points, in my view, the required assessment under s.9(2) can be approached in two stages:

- i) Stage 1: assess the nature of the publication and its extent in each jurisdiction.

A preponderance of publication in England and Wales is likely to be a weighty factor in demonstrating that England and Wales was clearly the most appropriate jurisdiction. If there has been more widespread publication elsewhere, then subject to any argument on ‘targeting’ and depending on the extent of the relative publication in the other jurisdictions, the claimant may struggle, simply on the basis of numbers, to satisfy the requirements of s.9(2).

- ii) Stage 2: assess the evidence of harm to reputation in the jurisdictions in which there has been publication.

If a claimant can provide evidence of very serious harm to reputation in England and Wales, then s/he may well succeed in demonstrating that this jurisdiction is clearly the most appropriate, notwithstanding any conclusion, at stage 1, that there has been more extensive publication outside England and Wales. A claimant might be able to demonstrate, by clear evidence, serious harm to reputation arising from a relatively tiny publication in England and Wales; perhaps the product of a ‘well-directed arrow’. Alternatively, a claimant might be able to put forward a powerful inferential case based on the extent of publication and the geographical limits on his/her reputation. For example, a contestant on reality show broadcast only in the UK might be completely unknown outside the UK. If s/he were to be defamed in a global publication, and assuming that there was more than a *de minimis* publication in England and Wales, the Court might be satisfied that, notwithstanding a larger publication of the libel elsewhere, this jurisdiction was nevertheless clearly the most appropriate. In that example, the more extensive the publication in England and Wales, the more powerful would be the inference of reputational

harm and the more likely that the Court would be satisfied that s.9(2) was met. Although it will engage similar issues, I should make clear that this analysis is entirely separate from the question of serious harm to reputation under s.1 Defamation Act 2013.

34. Evidence of a person's connections to a jurisdiction (which did not demonstrate the extent of his/her reputation) and evidence as to the relative convenience of England and Wales for the parties and witnesses may not, on its own, carry much weight, but could assume importance in a marginal case. A claimant who could not satisfy stage 1 and could not demonstrate evidence of any real harm to reputation in England and Wales at stage 2 might well fail to satisfy the Court that the jurisdiction was clearly the most appropriate based solely on other factors: e.g. the fact that s/he and his/her family lived in England and Wales; or that England and Wales was the most convenient jurisdiction for the parties and/or witnesses. The relevance of domicile or residence is likely to be a factor in the assessment of the extent of claimant's reputation in England and Wales and globally. If the claimant establishes – to the required high standard and by cogent evidence (*Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 [95]) – that s/he is at risk of not get a fair hearing in any particular jurisdiction, then the Court might well consider it appropriate to exclude that jurisdiction from the assessment. This was a factor in *Sloutsker* [48], [70]ff.
35. Depending on the facts, I suppose it might be possible for a claimant, by a process of elimination, to establish that England and Wales was the *only* appropriate place to bring the claim; by demonstrating that all the other candidate jurisdictions were inappropriate. In cases of global publication, that might prove to be a very difficult, if not an impossible, task.
36. As is immediately apparent from this analysis, the assessment under s.9(2) is highly fact-specific. It is impossible to lay down hard rules. But, to the extent that the old *forum non conveniens* rules involved an assessment of the “*balance of convenience*” (see [21] above), that is certainly not reflected in the test under s.9. Insofar as the metaphor of a balance remains apt, a claimant now has to show that the scales come decisively down in his/her favour. Mr Wolanski QC's submissions, set out in [17(i)-(iii)] above, are a misreading of *Huda* and incorrectly elide the old common law test with the provisions of s.9.

Evidence

Stage 1: nature and extent of publication

37. Although figures are not available for the number of times the YouTube Video was watched, based on the figures for subscribers to, and total views of, the Bitcoin YouTube Channel, it is common ground that the evidence demonstrates that the likely extent of publication is as follows:

i) **The Bitcoin YouTube Channel**

- In the period, 25 February 2016 to 22 June 2019:

Total views: 1,821,515 of which

United States:	422,698	(23.2%)
United Kingdom:	96,915	(5.3%)

Total subscribers:	2,420,214	of which
United States:	859,935	(35.5%)
United Kingdom:	185,935	(7.7%)

- In April 2019:

Total views:	73,135	of which
United States:	20,870	(28.5%)
United Kingdom:	4,985	(6.8%)

Total views by subscribers:	19,840	of which
United States:	6,136	(30.9%)
United Kingdom:	1,407	(7.1%)

- In the period: 14-18 April 2019:

Total views:	24,913	of which
United States:	7,029	(29.3%)
United Kingdom:	1,649	(6.9%)

ii) **The Twitter Account**

- As at May 2019

Active Followers:	c.582,000	of which
United States:	c.168,780	(29%)
United Kingdom:	c.52,554	(7%)

These figures would represent the maximum number of publishees on Twitter.

38. These figures, and the evidence, also establish:

- i) the most significant publication, across both platforms, is in the US;
- ii) in most instances, publication in the UK is the second most significant; and
- iii) roughly, the publication in the US is around four times that in the UK.

Stage 2: harm to reputation

39. Mr Wolanski QC has submitted that the following evidence is relevant to the assessment of the extent of and harm to the Claimant's reputation in England and Wales:

- i) The Claimant immigrated to the UK with his family from Australia in December 2015. The family have lived in the UK ever since and have moved all their belongings here, and this is now their settled home.

- ii) Since emigrating to this jurisdiction, the Claimant has spent the ‘overwhelming majority’ of his time here.
 - iii) The Claimant’s evidence is that he intends to stay permanently in the UK, and intends to apply for British Citizenship as soon as he is eligible, i.e. after he has been living here continuously for 5 years.
 - iv) The Claimant’s wife has settled connections here and two of their three children are being educated in the UK.
 - v) The Claimant pays both local and national taxes in the UK.
 - vi) The Claimant currently rents a home here for his family, has already sought to buy a property here as his home, and intends to buy a home once he has located a suitable property.
 - vii) The Claimant works in the UK. He is employed by a UK company, nChain.
 - viii) The Claimant is undertaking postgraduate studies at the University of Leicester and at SOAS in London.
 - ix) The Claimant has been the subject of widespread media coverage in this jurisdiction, reflecting the extent to which he is a recognised figure here. Mr Wolanski QC referred me to an article in the *London Review of Books* published in June 2016 that featured the Claimant.
40. As Mr Tomlinson QC has pointed out, the evidence clearly demonstrates that, whatever reputation he enjoys in the UK as a result of these activities, he has an international profile. On his own website, the Claimant promotes himself as follows:
- “[The Claimant] 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, and also the Bitcoin blockchain as a transformative technology platform. Currently, [the Claimant] is Chief Scientist for nChain – the global leader in advisory, research , and development of blockchain technologies... Before his early and extensive work with Bitcoin, [the Claimant] had over 20 years of experience in the fields of information technology and security, and is one of the most highly qualified digital forensics practitioners in the world... A prolific researcher, [the Claimant] has been a lecturer and researcher in computer science at Charles Sturt University [Australia]. He has also authored many articles, academic papers and books on IT, security, Bitcoin, and other cryptocurrency issues. [The Claimant] is now a sought-after public speaker internationally on security, Bitcoin and cryptocurrency topics, while also presenting his research findings at academic and business conferences.”
41. In his witness statement, the Claimant has confirmed that he often speaks at international conferences concerning Bitcoin and cryptocurrencies and says that he is widely acknowledged as “*one of the world’s foremost blockchain experts*” a recognition he says “*includes*” in the United Kingdom.

42. The Claimant addresses the harm to his reputation in the UK in three paragraphs in his first witness statement:

“47. The defamatory attacks by [the Defendant] damage my integrity within the United Kingdom’s community of business people with whom I primarily deal. Being labelled a fraud has a repellent effect with regard to future business – if people view me as a fraud, my proficiency as a computer scientist as well as my life’s work will be called into question. Moreover, no one would reasonably enter into business dealings with someone thought to be a fraud.

48. The vast majority of my business peers are in the United Kingdom as well as my work place. Clearly, my reputation will suffer the most here as [a] result of [the Defendant’s] defamatory attacks. I have solidly established my professional and personal reputation in the UK.

49. I came to the United Kingdom in part because I wanted to hire personnel of the highest calibre to work with me in developing, inventing and re-inventing technology that will positively impact people’s lives. Being able to hire local PhD mathematicians has transformed nChain and helped it to grow substantially. These talented technicians want to join nChain because of my reputation in the field. Continual reputational attacks in the United Kingdom will dash any hope of hiring such talented people.”

43. At the hearing, Mr Wolanski QC confirmed that the effort to recruit staff to nChain was not limited to people in the UK. nChain would hope to attract candidates globally. In that respect, it is not only the Claimant’s UK reputation that has a bearing on this, but also his global reputation.

44. In his second witness statement, the Claimant states that he has been asked to respond to governmental requests for information from the UK, China, the US, Singapore, Canada, New Zealand, Australia and Uzbekistan. He also details his efforts to file a copyright registration for the Bitcoin Whitepaper in the US. The details are not particularly material, but the Claimant does say this:

“There were questions in the wider Bitcoin community about the authorship of the Whitepaper and these questions were hindering my efforts to build a global business (both blockchain and coin) based on Bitcoin SV...”

45. I would note here that Bitcoin is a global cryptocurrency and, likewise, the Bitcoin community that the Claimant described in his statement is a global community, not one limited to the UK.

46. Mr Wolanski QC confirmed that there is no other evidence as to the extent of the Claimant’s reputation in the UK (or elsewhere). Specifically, there is no evidence at all of any actual reputational harm that the Claimant has suffered as a result of any of the Defendant’s publications.

47. Mr Tomlinson QC submits, correctly in my judgment, that the Claimant has not provided the Court with any evidence (beyond the limited material I have set out above) as to the global reputation he enjoys and, more particularly, the extent to

which it has been damaged by the Defendant's publications. With some justification, Mr Tomlinson QC suggests that the Court has been "blindfolded" as to where the Claimant has suffered serious reputational harm.

Decision

Stage 1: nature and extent of publication

48. The evidence clearly demonstrates that the most substantial publication of the statements complained of is in the US. It is common ground that, of the global publication, only some 7% took place in England and Wales. 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'.
49. The publications complained of were not in any way 'targeted' at publishees in England and Wales. Undoubtedly, the publications were targeted the Claimant, but the topic – Bitcoin – was of global interest. In reality, the Defendant addressed his remarks to the global Bitcoin community, not any sector of it exclusively in the UK. It is true that the Claimant has been resident in the UK since 2015, but has little to do with the issue of targeting. The message in the publications complained of would have been targeted at him in whatever jurisdiction he lived. These were global publications disseminated on global platforms.

Stage 2: harm to reputation

50. In my judgment, the Claimant's evidence as to the extent of harm that the publications have caused (or are likely to cause) is weak, lacks detail and the three paragraphs I have set out ([42] above) put forward evidence at a level of generality that is almost entirely speculative. There is no objective evidence of any harm to reputation in England and Wales. The Claimant has failed completely to address whether and to what extent the publications complained of have harmed his reputation in other jurisdictions. The evidence demonstrates clearly that the Claimant enjoys a global reputation, the vast majority of which was generated before he moved to the UK. It is impossible for the Claimant to divide his reputation into neat jurisdictions; it is clearly global. Mr Wolanski QC did not submit that the Claimant has not suffered damage to his reputation beyond England and Wales – on the evidence that would have been extremely unlikely – the whole issue is simply left completely unaddressed in the Claimant's evidence. That is so, even though the evidence that is required has been clearly identified in *Ahuja* (see [28] above). Although Mr Wolanski QC did submit that the Claimant faced some difficulties in providing evidence of harm in multiple jurisdictions, and the Court had to be realistic about what evidence a claimant could be expected to provide, I am not satisfied that there is any real impediment to the Claimant providing such evidence. None of the potential issues of impairment of access to justice under Article 6 arises (see discussion in *Ahuja* [33]-[38]). The reality is that the Claimant has not made any real attempt to address this important issue in his evidence.
51. Whilst I accept the points identified by Mr Wolanski QC - summarised in [39] above - this evidence does not provide any real basis on which I could be satisfied that England and Wales is clearly the most appropriate place for the Claimant to bring this action. Points (i) to (viii) do demonstrate that the Claimant and his family have been

putting down roots in the UK. I do not doubt that. The process of doing so will, to some extent, increase the reputational interests that he has in this jurisdiction. But they cannot and do not displace the global reputation that he already enjoys. He has brought that with him to the UK. He is doing nothing to shed that global reputation; on the contrary, he promotes it on his website, and he continues to occupy a space on the global Bitcoin stage, for example through his attendance at conferences and his publications. The Claimant's reputation in England and Wales is "*an inseparable segment of his reputation worldwide*": ***Berezovsky -v- Forbes Inc.* [2000] 1 WLR 1004, 1023A** per Lord Hoffmann. Point (ix) serves only to demonstrate that the Claimant has a notoriety or profile that means he is of interest to readers of UK publications. That is entirely consistent with his global reputation. It does not demonstrate that his profile is limited to England and Wales; plainly it is not.

52. In my judgment, the Claimant has failed to demonstrate that, judged in terms of harm to reputation, England and Wales is clearly the most appropriate place to bring this defamation claim.

Other factors

53. There is no suggestion that the Claimant would not get a fair trial in any of the alternative candidate jurisdictions. I accept that the Claimant would find it more convenient to have the claim tried in England and Wales, simply on the basis that he now lives in the UK. I also accept that the Defendant has not submitted that he would find it in any way difficult if the action continued here. Nevertheless, these are minor factors which carry little weight when assessed against the extent of publication and harm to reputation.

Is the US the most appropriate jurisdiction?

54. 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 resolve this issue (see [24] above). Indeed, as the Claimant has declined to provide evidence of the extent of his global reputation and the harm that has been occasioned by the publications complained of, for example in the US, I lack a basis on which to make any real assessment. I only have half of the picture; i.e. the extent of publication in the US. In his evidence, the Defendant has indicated that he consents to the Claimant's claim being brought in the US. That concession avoids the need for any analysis of the evidence, and determination, whether, absent the Defendant's consent, a US Court would have had jurisdiction over the claim. The evidence demonstrates that there are US Courts that will accept jurisdiction where the parties have consented. In consequence, the US remains an alternative jurisdiction in which the Claimant could pursue his claim. This is not a case where the Claimant has demonstrated that there are no other jurisdictions within which he could pursue his claim and, therefore, by a process of elimination, England and Wales is left as the *only* place in which he can bring an action.

Conclusion

55. The Claimant has not satisfied me that England and Wales is clearly the most appropriate place to bring his action for defamation over the publications complained

of. In consequence, the Court has no jurisdiction to hear and determine the action. The action will be struck out.

The Set-Aside Application

56. Given my decision on s.9 jurisdiction, this Application has become academic. Nevertheless, as the points raised have been argued fully and as it is a point of some importance to defamation practice, I will set out my decision.
57. Mr Tomlinson QC's argument, put shortly, is that, as the Claimant clearly believed that the Defendant was domiciled outside the countries identified in s.9(1) (albeit mistakenly that he was domiciled in Japan), the Claimant was under an obligation to seek the Court's permission even to issue a Claim Form. He submits that s.9 is mandatory in its terms: the Court "*does not have jurisdiction*", unless the requirements of s.9(2) are satisfied. A claimant who knows that s.9(1) applies cannot issue a Claim Form without satisfying the Court that it has jurisdiction, i.e. s.9(2) is satisfied. Upon this analysis, the Claimant was duty-bound on an ex parte application, to alert the Master to the alleged want of jurisdiction over the claim under s.9.
58. This argument is novel, but in my judgment, it is wrong for the following reasons:
- i) Mr Tomlinson QC has identified no authority for the proposition that a claimant can be required to apply to the Court for permission to issue a Claim Form.
 - ii) The section provides that the Court does not have jurisdiction to "*hear and determine an action*". Unless a Claim Form is issued, there is no "*action*". If Parliament had intended what Mr Tomlinson QC is suggesting, it could have said so expressly, e.g. "*a court does not have jurisdiction to issue a claim to which this section applies unless...*".
 - iii) An action is completely constituted (e.g. for the purposes of limitation) when the Claim Form is *issued*, but it is not until the Claim Form is *served* that the defendant becomes subject to the Court's jurisdiction: ***Barton -v- Wright Hassall LLP [2018] 1 WLR 1119*** [8]. It is the *issue* of a Claim Form which invokes the Court's jurisdiction or machinery. Thereafter, the Court can make orders in the claim, including, for example, following a demand made of the claimant by a defendant an order that the Claim Form be served upon the defendant (CPR 7.7).
 - iv) After issue of the Claim Form, the CPR provides for questions of jurisdiction to be considered in two principal ways:
 - a) where applicable, the requirement to obtain permission to *serve* a Claim Form out of the jurisdiction as provided in CPR Part 6.36; and
 - b) the regime for objecting to the Court's jurisdiction under CPR Part 11.Mr Tomlinson QC's submission would erect an entirely new regime, outwith Part 11, for jurisdictional challenges in defamation claims.
 - v) Challenges to the Court's jurisdiction are frequently fact-sensitive: e.g. whether the damage has been sustained, or will be sustained, within the jurisdiction (see CPR Part 6 PD6B §3.1(9)(a)). Whether s.9(1) applies is

dependent on a factual assessment of domicile. Whereas, in some cases, a claimant may not know the domicile of the defendant, the defendant will. It is for him/her to raise the point by filing an Acknowledgement of Service objecting to the jurisdiction of the Court (CPR 10.1(3)(b)). Any factual dispute would then have to be resolved by the Court.

- vi) In respect of s.9(1), the factual dispute is relatively straightforward to resolve: where is the defendant's domicile? However, s.10 Defamation Act 2013 uses precisely the same wording when providing that the Court "*does not have jurisdiction*" over a defamation claim that is brought against a person "*who was not the author, editor or publisher of the statement complained of, unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher*". If Mr Tomlinson QC's submissions were correct, before the Claimant could be permitted to issue a Claim Form, in a relevant case, s/he would equally have to satisfy the Court that it had jurisdiction under s.10. As the issues in ***Monir -v- Wood* [2018] EWHC 3525 (QB)** demonstrate, in some cases, deciding whether the defendant is "*author, editor or publisher*" may be factually (and legally) complicated – requiring resolution at a trial. And that is before any consideration of the further factual issue of "*reasonable practicability*" under the section. On Mr Tomlinson's model, the Claimant and the Court would have to embark on this exercise, possibly *ex parte*, as a pre-requisite of being permitted to issue the Claim Form. How would such an application be made? Under Part 8? Or would a simple Application Notice under CPR Part 23 be sufficient? If it is permissible to proceed under Part 23, how would the Court resolve any factual disputes? Would there be need of disclosure, witness statements, a trial? All before a Claim Form has been issued?
 - vii) These practical issues, the absence of authority and the clear undesirability of establishing an entirely new regime for objecting to jurisdiction in defamation claims lead me to conclude that Mr Tomlinson's submissions must be rejected. The regime for objecting to jurisdiction is contained within CPR Part 11. It is for a defendant to raise an objection, based his/her domicile, under s.9 following service of the Claim Form. In a large number of cases, the s.9 issue is likely to have arisen at the earlier point of seeking the permission to serve the Claim Form out of the jurisdiction.
59. Having rejected Mr Tomlinson QC's submissions as to the need to obtain the Court's permission to serve out, the balance of the objections to the hearing before Master Thornett also fall away:
- i) The Claim Form had been validly served on the Defendant by personal service under CPR 6.5(2) when he was present in the jurisdiction. No permission to serve out was required.
 - ii) Although the application before Master Thornett was for permission to serve an Amended Claim Form and Particulars of Claim out of the jurisdiction under CPR 6.38, the Master considered that such permission was not required. He made only an order permitting service of these documents by an alternative method under CPR 6.15. The domicile of the Defendant – and issues under s.9 – have no bearing on that decision.

- iii) Mr Tomlinson QC submits that even if the Claimant considered that s.9 was not relevant to the application before Master Thornett it was nevertheless his obligation to alert the Master to the potential argument. I regard this as unrealistic. For my part, before I heard Mr Tomlinson's submissions, I had never before considered – or had it submitted to me – that it might be necessary for a claimant to apply for permission even to issue a Claim Form where s.9 was potentially engaged. I do not consider that this was a point that the Claimant was realistically required to raise before the Master. Consistent with my analysis, if it was to be relied upon, s.9 was a point to be raised by the Defendant, as he did in his Acknowledgement of Service dated 13 June 2019. On an *ex parte* application, the duty is to alert the Court to all matters that might fairly be regarded as being material to the Court's decision. I am satisfied that Mr Tomlinson's ingenious argument did not fall into that category.
60. For these reasons, had it required determination, I would have refused the Set-Aside Application. I do not consider that there was any material non-disclosure. s.9 was irrelevant to the application that Master Thornett was asked to determine.