Neutral Citation Number: [2022] EWHC 3343 (KB)

Case No: QB-2019-001430

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2022

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

CRAIG WRIGHT	**Claimant**
- and –	
PETER McCORMACK	**Defendant**

- -
- -

Joshua Munro, Greg Callus and Lily Walker-Parr (instructed by **Ontier LLP**) for the **Claimant**
Catrin Evans KC, Ben Silverstone and George McDonald (instructed by **RPC - Reynolds Porter Chamberlain**) for the **Defendant**

Hearing date: 20 December 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain:

Introduction

1 This judgment deals with matters ancillary to the judgment I handed down on 1 August 2022: [2022] EWHC 2068 (QB), [2023] EMLR 2. The background is set out there. The following short summary suffices for present purposes.

2 Craig Wright claims to be Satoshi Nakamoto ("Satoshi"), the inventor of Bitcoin. Peter McCormack tweeted and said in a recorded discussion that Dr Wright is not Satoshi and that his claims to be Satoshi are fraudulent. Dr Wright brought a claim for libel against Mr McCormack. Dr Wright established at trial that some of Mr McCormack's publications were defamatory and caused serious harm to his reputation at the time when they were made.

3 It is important to be clear that Dr Wright has not established that he is Satoshi. He did not have to, because in this jurisdiction, once a claimant shows that a publication is defamatory and has caused serious harm to his reputation, it is for the defendant to establish that the publication is true. Mr McCormack initially advanced a defence that what he said about Dr Wright was true (among other defences), but later abandoned that defence (and others). The reason he gave for doing so was that the cost of a trial on that issue would be prohibitive for him.

4 Ordinarily, a claimant in Dr Wright's position would be entitled to substantial damages. In this case, however, I decided that he should have only nominal damages of £1. The reason was that, in an attempt to establish that Mr McCormack's publications had caused serious harm to his reputation, an essential element of a defamation claim, Dr Wright had advanced a deliberately false case until shortly before trial. When the falsity was exposed, he changed his case, explaining that he had made inadvertent errors. I rejected that explanation as untrue.

5 As I noted in my judgment, this was not the first occasion on which Dr Wright's evidence to a court has been found to be unreliable. I set out at [87]-[88] of my judgment some excerpts from the decisions of two United States federal judges, who came to the same conclusion. Since I gave judgment, my attention has been drawn to the observations of Butcher J, sitting in the Commercial Court in this jurisdiction, who found Dr Wright to be an unsatisfactory witness in many respects: *Ang v Relantco Investments* [2020] EWHC 3242 (Comm), at [49]. Subsequently, in proceedings between Dr Wright and Magnus Granath, District Court Judge Helen Engebrigtsen of the Oslo District Court in Norway held on 20 October 2022 that Mr Granath had "ample factual basis to claim that Wright had lied and cheated in his attempt to prove that he is Satoshi Nakamoto".

6 Shortly after I gave judgment, RPC, the solicitors acting for the defendant, drew my attention to information which appeared to indicate a breach by Dr Wright of the embargo subject to which the draft judgment had been communicated to the parties.

7 There are, accordingly, four issues before me today:

(a) What action should I take, if any, in relation to the alleged breach of the embargo on my draft judgment?

(b) What injunctive relief, if any, should I grant to prevent Mr McCormack from repeating the statements giving rise to this claim?

(c) Should Dr Wright have permission to appeal against my decision to award him only nominal damages?

(d) Costs.

Breach of the embargo

8 I produced my judgment in draft a few days before it was handed down. It was sent to counsel under embargo at 3.06pm on Tuesday 26 July 2022 and had on its face the usual warning:

> "IN CONFIDENCE
>
> This is a judgment to which the Practice Direction supplementing CPR Part 40 applies. It will be handed down on 1 August 2022 at 12.00 noon. This draft is confidential to the parties and their legal representatives and accordingly neither the draft itself nor its substance may be disclosed to any other person or used in the public domain. The parties must take all reasonable steps to ensure that its confidentiality is preserved. No action is to be taken (other than internally) in response to the draft before judgment has been formally pronounced. A breach of any of these obligations may be treated as a contempt of court…"

9 The relevant Practice Direction supplementing CPR Part 40 is CPR 40E PD. It provides in material part as follows:

> "2.4 A copy of the draft judgment may be supplied, in confidence, to the parties provided that –
>
> (a) neither the draft judgment nor its substance is disclosed to any other person or used in the public domain; and
>
> (b) no action is taken (other than internally) in response to the draft judgment, before the judgment is handed down.
>
> …
>
> 2.8 Any breach of the obligations or restrictions under paragraph 2.4… may be treated as contempt of court."

10 Later on the evening of 26 July 2022, Dr Wright posted three messages on the "#bitcoin-general" channel of the MetaNet workspace of the Slack messaging platform.

(Slack is a platform designed for business use on which members can establish "workspaces" on which to communicate. Each workspace has "channels" dedicated to particular topics on which members can have conversations.) The MetaNet workspace was established by MetaNet ICU Ltd, a company established to promote industry education in relation to Bitcoin Satoshi Vision ("BSV"), a product which Dr Wright and Calvin Ayre together promote. It has 340 active members. The "#bitcoin-general" channel has 290 members.

11 Dr Wright's messages were as follows:

> "If a person would spend 4 million to receive a dollar plus and 2 million costs…
>
> So the other side is bankrupt…
>
> What would you think? (edited)"
>
> "Ie.
>
> The only thing that matters is crushing other side"
>
> "Well.
>
> I would spend 4 million to make an enemy pay 1."

12 Between 3.27pm on 29 July 2022 and 11.35am on 1 August 2022, Calvin Ayre (Dr Wright's "mentor" and business partner) posted a number of tweets including one in the following terms:

> "Just as Craig won in Satoshi trial in Florida and IEEE now accept he is Satoshi, he has won in UK also and many more will now come to this same fact based conclusion. the trolls of injustice are losing to truth".

13 These matters were brought to the attention of Dr Wright's solicitors, Ontier, by an email of 4 August 2022. They drew the matter to my attention on 5 August 2022 and filed a "report" on 11 August 2022. In the copy sent to Mr McCormack's solicitors, parts of the report were redacted where reference was made to matters which Ontier considered to be privileged and/or confidential.

14 The report says this:

> "17. Dr Wright has informed us of the following:
>
> 17.1 The purpose of the post was not to give any indication as to the outcome set out in the Draft Judgment. The purpose of the post was to encourage debate amongst the members of the Slack Channel and to give an indication of Dr Wright's dogged approach to his opponents in the digital assets sphere generally; and

> 17.2. Dr Wright does not recall ever mentioning to members of the Slack Channel that the usual practice of the Court is to circulate a draft version of the judgment to the parties in confidence before it becomes public, and he does not believe that this practice would be common knowledge amongst members of the channel. As we explain below, there was nothing in Dr Wright's message (or any other message posted at around that time) to indicate that a draft judgment was imminent or had been received."

15 Attached to Ontier's report were copies of the replies to his messages. Ontier say that these do not indicate that anyone thought Dr Wright was referring to this litigation or was in receipt of a draft judgment. That being so, Ontier say this:

> "23… Dr Wright does not believe that his posts on the Slack Channel breached the Embargo and it was certainly not his intention to do so. However, to the extent that Dr Wright's posts are or may be considered by the Court to be a breach of the Embargo, Dr Wright unreservedly apologises to the Court and wishes to emphasise that any such breach was entirely unintentional and inadvertent."

16 As to Mr Ayre's tweet, Ontier say this:

> "28. Mr Ayre has confirmed to us that:
>
> 28.1. His view has always been that when Mr McCormack dropped his defence of truth, Dr Wright had proved that he had been defamed and had effectively won the litigation;
>
> 28.2. He was not aware of the outcome of the litigation prior to the handing down of the Judgment at noon on Monday 1 August. This is notwithstanding the emails at paragraphs referred to at paragraphs 35 to 44 below. Given he did not know the outcome of the case, he could not have been in breach of the Embargo;
>
> 28.3. His tweets were expressing his view that Dr Wright had already succeeded in the case when Mr McCormack dropped his defence of truth. Indeed, Mr Ayre had tweeted on various occasions prior to provision of the Draft Judgment that Dr Wright had been successful in the case. By way of example:
>
> 28.3.1. Mr Ayre's tweet of 19 May 2022 at 11:02 pm (BST), stated that the trial in these proceedings "…will be boring… Craig won already…this is only about how much money McCormack owes...";
>
> 28.3.2. Mr Ayre's tweet of 24 May 2022 at 6:36 am (BST), stated that Dr Wright "…won this case as soon as McCormack dropped truth defense [sic] as this meand [sic] McCormack

> accepts Craig is not a fraud and is Satoshi. This trial is only how much Peter [McCormack] has to pay to Satoshi"; and
>
> 28.3.3. Mr Ayre's tweet of 15 July 2022 at 6:00 am (BST), stated that Dr Wright "won his case against McCormack, and Cobra and Kleiman and will win all others including the Antigua case with Ver".

17 Paragraphs 35 to 44 of the Ontier report explain that, at 8.34pm on 28 July 2022, a member of the Ontier team sent an email to Dr Wright about other litigation. It was sent as a reply to an email containing a summary of the judgment. Dr Wright replied to the email, copying in five other people who were not entitled to know the substance of the judgment. He says that he did not realise that, at the bottom of the email chain, the email contained a summary of the judgment.

18 The importance of keeping confidential draft judgments circulated under the provisions of CPR 40E PD was recently emphasised by Sir Geoffrey Vos MR in *R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 181, [2022] 1 WLR 1915. At [21], the Master of the Rolls said this:

> "I should say that I have called this case into court because, amongst other reasons, the breaches that occurred here are not alone. I have become aware formally and informally of other breaches in other cases. It seems, anecdotally at least, that violations of the embargo on publicising either the content or the substance of draft judgments are becoming more frequent. The purpose of this judgment is not to castigate those whose inadvertent oversights gave rise to the breaches in this case, but to send a clear message to all those who receive embargoed judgments in advance of hand-down that the embargo must be respected. In future, those who break embargoes can expect to find themselves the subject of contempt proceedings as para 2.8 of CPR PD 40E envisages."

19 CPR 81.6(1) provides as follows:

> "If the court considers that a contempt of court (including a contempt in the face of the court) may have been committed, the court on its own initiative shall consider whether to proceed against the defendant in contempt proceedings."

20 I have considered carefully the explanation given in para. 17 of Ontier's report. However, it has to be evaluated in the light of three important contextual matters.

21 First, this case was one in which Dr Wright's own estimate of the costs he would incur to trial (as given to Master Davison, who dealt with costs budgeting in March 2020) was close to £4 million. This fact was referred to in Mr McCormack's evidence: see para. 12 of his Third Witness Statement. Anyone with a close interest in the litigation would be likely to know about it.

22 Second, although Dr Wright was engaged in a great deal of litigation worldwide, this case had attracted considerable publicity among those with an interest in cryptocurrency. Dr Wright embarked on this claim in order to establish that he is Satoshi (or, at least, to dissuade others from denying that proposition). He appears to have regarded those objects as important in part because of their impact on the success of Bitcoin Satoshi Vision (BSV), which he and Mr Ayre promote and in which they have a very significant financial interest.

23 Third, the 290 members of the channel on which Dr Wright's posts appeared on 26 July 2022 would all have been people with an interest in cryptocurrency in general and BSV in particular. Whether they had been told this by Dr Wright or not, any such person with even a passing knowledge of how High Court litigation in England works would know that, usually, the parties to a judgment are sent an embargoed copy of the judgment in advance of its being handed down.

24 Against that background, I am unable to accept without further investigation Dr Wright's explanation, as reported by Ontier, that the purpose of his posts on 26 July 2022 (hours after being informed of the substance of the judgment), was "not to give any indication as to the outcome set out in the Draft Judgment", but merely to "encourage debate". I consider that there is a real prospect that a court might find that, by posting those messages, Dr Wright was disclosing, and intending to disclose, the substance of the judgment contrary to the clear terms of the embargo, which had been explained to him. The emails referred to at paragraphs 33-44 of Ontier's report appear to be a further breach of the embargo by Dr Wright, which may amount to a further contempt of court, depending on the view the court takes as to his state of mind when he forwarded the relevant emails.

25 The practice of issuing judgments under embargo is an unusual feature of litigation in this jurisdiction. It has many benefits, which can only be achieved if parties abide scrupulously by the terms of the embargo. The Court of Appeal has signalled that breaches are likely to result in contempt proceedings. In my judgment, it would not be appropriate to take no further action in this case, where there is evidence showing that a litigant in High Court proceedings may have acted in deliberate breach of the embargo.

26 Pursuant to CPR 81.6(1), I will therefore issue a summons requiring Dr Wright to attend court for directions to be given. The matter will then be listed before another judge, nominated by the Judge in Charge of the Media and Communications List, who will give directions for the further conduct of the contempt proceedings.

27 I do not consider that the possible breaches by Mr Ayre require further investigation. His tweets were expressing a (false) view that he had expressed many times before – that Dr Wright had already won against Mr McCormack from the point when the latter abandoned his truth defence. They do not, therefore, provide a sufficient basis for concluding that he was disclosing the substance of the judgment. So, no further action will be taken in respect of Mr Ayre.

Injunctive relief

28 On 22 November 2020, on the eve of a hearing before Nicol J, RPC, Mr McCormack's solicitors, wrote to the court explaining that Mr McCormack would not be represented because he had taken the decision not to defend the claim, for costs reasons. That letter

repeated what had been said in letters to Dr Wright's solicitors, namely that he undertook to the court not to repeat the words complained of or the same or similar words, subject to two "carve-outs" which "appear to be agreed by the Claimant". The carve outs were:

> "First, that this undertaking does not prevent our client (as a journalist focussing on Bitcoin) from reporting general findings or allegations that the Claimant has committed fraud, including notably the findings reached in ongoing legal proceedings in Florida in which Magistrate Judge Reinhart found on 27 August 2019 that the claimant had perjured himself in those proceedings and forged documents to support his case. A copy of Reinhart J's judgment is attached – see in particular pages 19 to 21 which explain the Court's findings that the Claimant forged documents and perjured himself in relation to matters connected with the subject matter of this claim. Those findings were upheld on appeal by a District Judge Bloom. It should be noted that 29 of these allegedly forged documents are relied on by the Claimant in these proceedings, including as his 'primary' evidence on the factual issue of whether or not he is 'Satoshi Nakamoto' (which were identified per para 2 of the Order of Master Dagnall dated 30 July 2020). Further, the alleged 'final' version of the Bitcoin White Paper referred to at paragraph 20 of the Amended Reply and produced to the Defendant on 23 January 2020 in response to a CPR 31.14 request contains self-evidently manipulated metadata in a similar fashion, purporting to show that the document was created on 24 March 2009 after the metadata also records the document was 'last edited' on 21 May 2008 (i.e. a logical impossibility) (see screenshot INSPECTION 0004 metadata attached). The Claimant and his solicitors have refused to discuss or explain why the metadata in this key document, which is absolutely central to his claim to being Satoshi Nakamoto, has had its metadata tampered with, apparently to suggest it was last edited before the Bitcoin White Paper was released by Satoshi Nakamoto in October 2008.
>
> Second, that if the English Court finds that the Claimant's claim to being Satoshi Nakamoto is fraudulent in separate proceedings, including in an almost identical and ongoing claim brought by the Claimant against Marcus Granath (claim no: QB-2019-002311), that our client is released from his undertaking."

29 Nicol J said that these "carve-outs" were agreed on behalf of Dr Wright, but the undertakings were never recorded in a court order.

30 Catrin Evans KC, for Mr McCormack, has refined this undertaking into a simpler form, which takes into account that, since the hearing before Nicol J, there have been at least two further judgments relevant to these matters – mine and that of District Judge Engebrigtsen of the Oslo District Court. The undertaking now offered is as follows:

> "The Defendant will not repeat the allegations complained of in these proceedings, save that the Defendant may refer to or report on any judicial finding by a court, tribunal or other judicial authority (in this jurisdiction or any other jurisdiction) concerning the Claimant."

31 I raised with the parties whether there should be any undertaking or injunctive relief at all, given my findings that Dr Wright had advanced a deliberately false case on serious harm. Ms Evans, perhaps not surprisingly, was disposed to submit that there should not, while not withdrawing the offer to give an undertaking in the form I have mentioned if I considered it necessary.

32 Mr Callus, for Dr Wright, initially said that he was aware of no case in which a claimant had succeeded in establishing a cause of action in defamation but had been denied injunctive relief to prevent a repetition of the defamatory statements. However, in response to a question I asked of Ms Evans KC, she pointed out that this had occurred in *FlyMeNow*: see at [131]. Mr Callus argued that it was important for there to be finality in litigation and refusing to accept an undertaking or grant an injunctive remedy would leave the question of what Mr McCormack is entitled to say entirely at large.

33 As to the terms of the undertaking, Mr Callus submitted that Mr McCormack should not be permitted to refer to judgments or findings by courts in this or other jurisdictions insofar as the reference involved repetition of the words found to be defamatory. If Dr Wright were found not to be Satoshi in a judgment in this or any other jurisdiction, Mr McCormack could apply to discharge the undertaking or injunction. But for the time being, there was nothing inappropriate in his being subject to restrictions which do not apply to others commenting on judicial proceedings.

34 There was some confusion before me as to whether Mr McCormack has <u>already</u> given the undertaking I have set out at para. 28 above. Although he certainly offered such an undertaking, I do not think that undertaking was ever accepted. It is the almost invariable practice of this court to record an undertaking which it accepts in a formal order. Breach of an undertaking may give rise to a contempt of court. This makes it critical, not only that there should be no doubt as to the terms in which the undertaking is given, but also that a judge should satisfy himself or herself that the undertaking is framed in terms which are enforceable. A court considering whether to accept an undertaking should bear in mind that doing so might lead to further proceedings if it is alleged that the undertaking is breached. If the terms of the undertaking will give rise to serious difficulties of enforcement, that is a factor which may tell against accepting it in the first place.

35 In this case, there is no order accepting or recording the undertaking offered by Mr McCormack on 22 November 2020. Nor is there any other indication that Nicol J intended to accept the undertaking. It is very doubtful that it would have been appropriate to do so. The terms of the "carve outs" were so extensive that it would have been almost impossible to police. The undertaking amounted to saying: "I promise not to say that Dr Wright's claim to be Satoshi is fraudulent, but I reserve my right to allege that he put fraudulent evidence before a court in support of that very claim". Had such an undertaking been offered to me, my first thought would have been of the judge who might at some stage have to determine whether this undertaking had been breached.

Courts are not required to, and generally should not, make rods for their own backs. I would not have accepted the undertaking. If, contrary to my view, Nicol J accepted it, I would discharge it now.

36 The undertaking now offered is superficially different. Its terms do not include whole paragraphs of argument. But on analysis, similar difficulties in enforcing it would be likely to arise. The caveat would allow Mr McCormack to report on "any judicial finding by a court, tribunal or other judicial authority (in this jurisdiction or any other jurisdiction) concerning the Claimant". That would include the findings referred to in the original undertaking, as well as my findings and those of District Judge Engebrigtsen. I note that the latter include the finding that "Granath had ample factual basis to claim that Craig Wright is not Satoshi Nakamoto in March 2019". The task of a judge called upon to determine whether the undertaking now offered had been breached would remain an unenviable one. I decline to accept the new undertaking.

37 The route suggested by Mr Callus through these difficulties is simple: grant an injunction restraining Mr McCormack from repeating the words complained of, or similar words, leaving it to him to apply to this court for the injunction to be discharged if it is established in future proceedings, in this or another jurisdiction, that Dr Wright is <u>not</u> Satoshi.

38 Persuasively though these submissions were advanced, I am unable to accept them, for five reasons.

39 First, an injunction is an equitable remedy. It is never available as of right, whether in libel proceedings or any other. One matter to be taken into account in deciding whether to grant it is the conduct of the claimant. Where, as here, a claimant has advanced a deliberately false case on an essential element of his claim, he should not expect the court to reward him with an injunction. To the extent that this results in him winning a Pyrrhic victory, that is the consequence of his own dishonest conduct.

40 Second, Mr Callus accepts that it would not be right to restrain Mr McCormack from reporting the terms of my judgment. He has to accept that, given that one of the remedies Dr Wright originally sought (though no longer seeks) was an order under s. 12 of the Defamation Act 2013 that Mr McCormack publish a summary of my judgment. Anyone fairly reporting the terms of my judgment would be entitled to say that Dr Wright had advanced a deliberately false case and given deliberately false evidence as part of his claim to have suffered serious harm. If it would not be right to restrain Mr McCormack from repeating what I said, it is difficult to see how it could be right to restrain him from repeating what District Judge Engebrigsten said. An injunction which forbade him from repeating the words complained of, or similar words, while allowing him to repeat what District Judge Engebrigsten said, would run into precisely the enforcement difficulties I have mentioned.

41 Third, it is apparent that there is a great deal of litigation concerning the subject matter of these proceedings, in various jurisdictions. It would not be desirable for the court to grant injunctive relief which might have to be varied or refined on a rolling basis as new judgments are handed down. Nor is there any good reason why the onus should be on Mr McCormack to begin further potentially costly proceedings to have the injunction discharged.

42 Fourth, insofar as Dr Wright is entitled to relief which marks the fact that he has been libelled and that Mr McCormack has been unable to establish the truth of the libel, my public judgment does that. (It is a separate question, to which I turn below, whether Dr Wright should have permission to appeal against my decision to award £1 only in damages.)

43 Fifth, complex decisions may have to be made about the extent to which my judgment gives rise to issue estoppels or is overtaken by subsequent developments. I am not convinced that injunctive relief is required to impress on Mr McCormack the importance of caution in taking these decisions. The costs he has already incurred in these proceedings will operate as a powerful reminder of the consequences of precipitate or ill-judged public statements.

Permission to appeal

44 Dr Wright's application for permission to appeal was advanced on one ground only: that I erred in finding that Dr Wright's dishonesty should serve to reduce damages to a nominal sum. The submissions on this point were advanced in an admirably clear document signed by Lord Wolfson KC, who did not appear at trial, as well as by Ms Walker-Parr, who did. Orally, they were advanced by Greg Callus.

45 Mr Callus explained that this ground of appeal does not seek to challenge my factual finding that he engaged in serious misconduct by advancing a deliberately false case, nor with the legal proposition that *Joseph v Spiller* [2012] EWHC 2958 (QB) (Tugendhat J) and *FlyMeNow Ltd v Quick Air Jet Charter GmbH* [2016] EWHC 3197 (QB) (Warby J) are authority for the proposition that any misconduct of the claimant may serve to reduce damages to a nominal sum. However, Mr Callus argued that this legal proposition comes solely from the decision of the Court of Appeal in *Campbell v News Group Newspapers Ltd* [2002] EWCA Civ 1143, [2002] EMLR 43 and that the Court of Appeal was "wrong… to conclude that such a principle of law exists".

46 This argument was not made at trial. If it had been, I would have been obliged to reject it, because I am bound by the Court of Appeal's decision in *Campbell.* That decision would also bind the Court of Appeal itself, save in the exceptional circumstances identified in *Young v Bristol Aeroplane Ltd* [1944] KB 718. None of those circumstances applies. Even without *Campbell*, I would have been required to follow *Joseph v Spiller* and *FlyMeNow*, both decisions of judges highly experienced in this area, unless convinced that they were clearly wrong. Far from being so convinced, I consider that they are correctly decided.

47 Damages in defamation serve three functions: "to act as a consolation to the claimant for the distress he or she suffers from the publication of the statement; to repair the harm to reputation…; and to act as a vindication of the claimant's reputation": *Gatley on Libel and Slander* (13th ed., 2022), para. 10-004.

48 As to distress, I indicated at [143] of my judgment that, having found Dr Wright not to be a witness of truth, I would have rejected in its entirety his case as to the distress he claims to have suffered. As to compensation for injury to reputation and vindication of reputation, I found that Mr McCormack's publications caused serious damage to Dr Wright's reputation at the time when they were made. But any damages would have been awarded at the date of my judgment. By that time, Dr Wright had been shown in a

public judgment to have advanced a deliberately false case on an essential part of his claim and to have given deliberately false evidence on oath about it. The question of what award of damages was necessary to "vindicate" his reputation fell to be assessed on that basis. I found that there would be no injustice if he were to receive only nominal damages.

49 The analogy with other torts is, in my judgment, not a good one. Dishonest exaggeration of a personal injury claim does not lead to a reduction in the damages payable (*Ul-Haq v Shah* [2009] EWCA Civ 542, [2010] 1 WLR 616), though in an extreme case it may entitle the defendant to strike out the claim, even after trial (*Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 1 WLR 2004). But damages in personal injury claims compensate for injury to interests which are unaffected by the dishonesty. The award needed to make good the injury suffered by a claimant with a broken leg is the same whether the claimant has been honest or dishonest. A libel claimant who has been found in a public judgment to have dishonestly advanced a deliberately false claim, on the other hand, may have so injured his own reputation that an award of substantial damages is no longer called for to vindicate it. Vindication has a moral element. If, as here, it would be unconscionable for a claimant to receive substantial damages, that is a good indication that damages are not required for the purpose of vindication.

50 The new point advanced in writing by Lord Wolfson and orally by Mr Callus has no real prospect of success in the Court of Appeal. There is no other compelling reason for an appeal to be heard. I refuse permission to appeal.

Costs

Dr Wright's submissions

51 Having initially argued that Mr McCormack should pay the majority of the costs incurred in these proceedings, Dr Wright now accepts that he should pay all of Mr McCormack's costs of the proceedings on the indemnity basis save that:

(a) costs orders made in Dr Wright's favour by Master Dagnall ("the Dagnall Order", summarily assessed at £18,500 including VAT) and Julian Knowles J ("the Knowles Order", estimated to be more than £900,000) at earlier stages of the litigation should stand; and

(b) Mr McCormack should pay the costs of two applications made at earlier stages of the litigation ("Mr McCormack's Strike Out Application" and "Dr Wright's Specific Disclosure Application") in respect of which costs were reserved.

Mr McCormack's submissions

52 Ms Evans applies to set aside the Dagnall and Julian Knowles Orders under CPR 3.1(7) and/or under the inherent jurisdiction and submits that CPR 44.11 is also relevant. She submits that neither order would have been made if the fraud now established had been uncovered closer in time to when it was first perpetrated (29 November 2019, when the draft Particulars of Claim were served). Had it been, Mr McCormack would have taken steps to strike out the claim as an abuse of process. Such an application would have succeeded. At least, the proceedings would have followed a very different course.

Reliance is placed on the costs judgment in *Joseph v Spiller* [2012] EWHC 3278 (QB), where at [12] Tugendhat J had regard to the fact that, had the dishonesty been admitted before trial, the claim would have been struck out, and on *Owners of the Ship Ariela v Owners and/or Demise Charterers of the Dredger Kamal XXVI and the Barge Kamal XXIV* [2009] EWHC 3256 (Comm), where Burton J set aside a final costs order on the ground of fraud.

53 Dr Wright's Specific Disclosure Application was made on 22 January 2021. Mr McCormack's costs of that, and of the Strike Out Application, should be paid by Dr Wright on the indemnity basis because the award of nominal damages means that he was the successful party: see e.g. *Joseph v Spiller* and *FlyMeNow*. Even if Dr Wright should be considered successful, I should depart from the usual rule and order Dr Wright to pay his costs because of Mr Ayre's provocation of the publications complained of, his excessive and oppressive use of costs, his conduct in respect of settlement and his gratuitous attacks on Mr McCormack and his witnesses.

Discussion

The costs left by Julian Knowles J to be determined by me

54 In *PDVSA Servicios SA v Clyde & Co.* [2020] EWHC 3430 (Ch), at [6], Sir Alistair Norris made this useful observation about cases where costs are "reserved":

> "On interim applications where the outcome is driven by practical considerations (such as the desire to cause the minimum of injustice until the rights and wrongs can be sorted out) costs are generally reserved because it is not possible fairly to decide who is the successful party. There may, of course, be particular features of the application or the detail of its conduct which make it just to make a final order about the costs of the application: and there may be cases that are so straightforward that an order for "costs in the case" can be made. But where, as here, the judge hearing the interlocutory application reserves the costs of the application to some later occasion and does not reserve those costs to himself or herself, it may, I think, be taken that that judge regards later events as being more likely to have a significant bearing on the just order for the costs of the application (though not determinative of it) than the detail of the conduct of the hearing before him or her. After all, the judge who eventually deals with costs will by then know 'the big picture' but will not know the minutiae of earlier hearings, and it is not in the interests of justice and the efficient use of Court time to re-run those earlier disputes purely to sort out the costs. The orders I propose adopt this approach."

55 I respectfully endorse this approach. I take the two applications in respect of which costs were reserved in turn. The first was the Specific Disclosure Application. Although the application related to matters distinct from the issue of serious harm (the issue on which I found that Dr Wright had been dishonest), it is appropriate to consider these costs as part and parcel of the costs of the action. I accept Ms Evans' submission that, looking at the "big picture", Dr Wright was awarded only nominal damages, so Mr

McCormack is the successful party, as were the defendants in *Joseph v Spiller* and *FlyMeNow*, and there is no reason why those costs should be treated any differently from the other costs which Dr Wright accepts he should pay. The same is true of the costs of Mr McCormack's Strike Out Application. In my judgment, Dr Wright should pay Mr McCormack his costs of these applications on the indemnity basis.

56 Such an order is justified. A litigant who advances a fundamentally dishonest case on an essential element of his claim should expect to pay the other side's costs on the indemnity basis. If I were in any doubt about this (which I am not), I bear in mind the evidence that Dr Wright seems to have intended to use the costs of this litigation as a means of preventing others from denying that he is Satoshi. In this regard, I bear in mind in particular:

(a) Master Davison's observation in March 2020 that Dr Wright's cost budget was "the biggest budget that I have ever seen personally in any category of work" and "certainly hugely in excess of any budget that I have seen in a defamation case";

(b) Dr Wright's messages on the Slack messaging platform, to which I have referred earlier: see para. 11 above. See, in particular, his reference to "crushing" his enemies, by bankrupting them.

(c) Mr Ayre's tweet of 13 April 2019 (posted shortly after he had tweeted a photograph of himself, Dr Wright, Dr Wright's then-leading counsel and others at a "troll hunting meeting"): "judge only needs one troll to pass judgement... no need to sue everyone... just waiting for a volunteer to bankrupt themselves trying to prove a negative and then letting Craig show the proof. Who will be this moron?"

57 Litigants should be in no doubt that the courts of this jurisdiction will not allow their costs rules to be used for tactical purposes of this kind: see *Excalibur Ventures LLC v Texas Keystone Inc* [2013] EWHC 4278 (Comm).

Mr McCormack's application to set aside the Dagnall and Knowles Orders

58 CPR 3.1(7) provides that a power of a court under the CPR to make an order "includes a power to vary or revoke the order". In *Tibbles v SIG plc* [2012] EWCA Civ 518, [2012] 1 WLR 2591, Rix LJ reviewed the jurisprudence and held at [39] that "considerations of finality, the undesirability of allowing litigants to have two bites of the cherry and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion". It was not necessary in that case to consider whether, in the case of a final order, there was no jurisdiction to vary or revoke at all. The jurisdiction was normally to be exercised only where (a) there has been a material change of circumstances since the order was made, or (b) the facts on which the original decision was made were (innocently or otherwise) misstated. At [40] of his judgment in Tibbles, Rix LJ noted that "[t]he revisiting of orders is commonplace where the judge includes a 'Liberty to apply' in his order", though he went on to question whether a liberty to apply was indispensable.

59 In *Terry v BCS Corporate Acceptances Ltd* [2018] EWCA Civ 2422, Hamblen LJ said this at [75]:

> "In summary, the circumstances in which CPR 3.1(7) can be relied upon to vary or revoke an interim order are limited. Normally, it will require a material change of circumstances since the order was made, or the facts on which the original decision was made being misstated. General considerations such as these will not, however, justify varying or revoking a final order. The circumstances in which that will be done are likely to be very rare given the importance of finality."

60 Recently, in the different context of reconsidering an order before sealing, the Supreme Court emphasised that when exercising such a discretion the court should consider whether the factors favouring re-opening were such as, in combination, to overcome the "deadweight" of the finality principle, together with any other considerations in favour of leaving the order in place: *AIC Ltd v Federal Airports Authority of Nigeria* [2022] UKSC 16, [2022] 1 WLR 3223.

61 For my part, I do not think that the final paragraph of Julian Knowles J's order (which contained a "liberty to apply") can bear the weigh that Ms Evans places on it. Like Rix in *Tibbles*, As the White Book commentary says at para. 3.1.17, it is difficult to see how a liberty to apply can affect the requirements for setting aside an order, or how its absence could prevent an application to vary or revoke an order if such an application were otherwise well-founded.

62 In any event, a liberty to apply is typically included in an interim or case management order to make clear the judge's intention that if circumstances change there is no need to appeal; rather, an application can be made to the same court to vary or revoke the order. But orders containing case management directions often also contain final provisions as to the costs of particular applications. The Knowles Order is an example. The liberty to apply is at paragraph 23, but paragraphs 16-23 all appear under the heading "Directions to trial". It makes sense that <u>these</u> directions should have been subject to a liberty to apply. The costs orders appear under a separate heading "Costs". They are in the nature of final orders, which could have been appealed at the time and could still be appealed now (though an extension of time would be required).

63 The caution urged by the Supreme Court in *AIC* therefore applies to this case. The Dagnall and Knowles Orders carry the "deadweight" of the finality principle. To justify overturning them, a very compelling case would have to be shown. The courts have generally been unwilling to interfere with final costs orders on interlocutory issues on the basis that the facts established at trial are different from understood when the orders were made: see e.g. *Koshy v Deg-Deutsche Investitions-Und Entwicklungs Gesellschaft GmbH* [2003] EWCA Civ 1718, [10] and [23]; and *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2009] EWHC 2014 (Ch), [13] and [41]. I note also that, in *Joseph v Spiller*, the order made to reflect the claimants' dishonesty was that they should pay 75% of the defendants' costs, "other than those costs in respect of which orders had already been made": see at [19]-[20].

64 I am not persuaded that the circumstances of the present case are such as to justify taking the exceptional step of setting aside the final costs orders made by Master Dagnall and Julian Knowles J. I have reached that view for three reasons.

65 First, the dishonesty related to the serious harm issue. The Dagnall and Knowles Orders did not depend to any significant degree on the nature of Dr Wright's case on serious harm. The Dagnall Order related to the costs of Dr Wright's application for an extension of time for standard disclosure (unsuccessfully opposed by Mr McCormack). The Knowles Order related to the costs of two amendment applications by Dr Wright to amend the Claim Form to add publications 12-16 and to correct timestamps (unsuccessfully opposed by Mr McCormack) and the costs relating to the abandonment and strike-out of Mr McCormack's positive defences, and associated witness evidence for trial which only went to those positive defences, and the costs of pleading to and disclosure relating to those positive defences.

66 Second, it is therefore not possible to say that the dishonesty I identified in my judgment was causative of the decisions in either case. It is one thing to set aside a final decision procured by fraud and quite another to set aside a final decision unaffected by fraud on the basis of a later finding about the conduct of one of the parties.

67 Third, I do not think that Ms Evans can get around this difficulty by saying that, had the fraud been known sooner after it was first perpetrated, Mr McCormack would have been able to strike out the claim. It will often be possible to say after the event that, had a finding made trial been known earlier, it would have been possible to take some other step in the litigation. That cannot be enough to disturb a final costs order which was not itself procured by fraud. It is relevant in this regard to note that Dr Wright succeeded in establishing serious harm despite abandoning his case about the invitations and disinvitations to academic conferences – i.e. this is not a case where the fraud undermined the claimant's ability to establish the cause of action at all.

68 For these reasons, I decline to set aside or vary the Dagnall and Knowles Orders.

69 CPR 44.11 is in my view not applicable here. It applies when a trial judge is conducting a summary assessment of costs or when a costs judge is conducting a detailed assessment. It is true that the reference to "costs which are being assessed" appears in 44.11(2)(a), and not in CPR 44.11(2)(b), but there is no good reason why the power to disallow costs should be applicable only when assessing costs, but the power to order a party or his representative to pay costs should be wider. The true relevance and scope of CPR 44.11 were identified by Dyson LJ in *Lahey v Pirelli Tyres* [2007] EWCA Civ 91, [2007] 1 WLR 998 (a case which concerned the proper interpretation of the predecessor rule) and by Deputy Master Friston in *Andrew v RetroComputers Ltd*, on 16 January 2019, (SCCO Ref CCD 1703316), at [68]-[80]. As explained, the rule allows the judge assessing costs (where there is already a costs order in favour or one party) to disallow particular costs on the basis that that party's conduct before or during the proceedings was unreasonable or improper, but it does not replace the trial judge's function of deciding what costs order to make in the first place.

70 If (as I have found) there is no proper basis to set aside the Dagnall and Knowles Orders under CPR 3.1(7), CPR 44.11 cannot be used to achieve the same thing by other means. CPR 44.11 may still be relevant at the next stage, when the costs come to be assessed. If the cost judge concludes that the dishonesty I identified in my main judgment generated costs on particular issues, he or she can use CPR 44.11 to disallow those costs, or order Dr Wright to pay the costs of those issues to Mr McCormack. That will be a matter for the costs judge.

Conclusion

71 For these reasons:

(a) I will issue a summons requiring Dr Wright to attend a directions hearing before a judge nominated by the Judge in Charge of the Media and Communications List, who will give directions for the conduct of contempt proceedings in respect of breach of the embargo.

(b) I decline to accept the undertaking offered by Mr McCormack or to grant any injunctive relief.

(c) I refuse permission to appeal against my decision to award only nominal damages.

(d) Apart from the costs the subject of the Dagnall and Knowles Orders, Dr Wright must pay all of Mr McCormack's costs of the proceedings, including the interlocutory applications in respect of which costs were reserved to me, on the indemnity basis. Mr McCormack's application to set aside the Dagnall and Knowles Orders is refused.