



Neutral Citation Number: [2021] EWHC 2671 (QB)

CLAIM NO.: QB-2019-001430

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2021

Before :

MR JUSTICE JULIAN KNOWLES

Between :

DR CRAIG WRIGHT
- and -
PETER MCCORMACK

Claimant

Defendant

Adam Wolanski QC, Greg Callus and Lily Walker-Parr (instructed by ONTIER LLP)
for the Claimant
Catrin Evans QC and Ben Silverstone (instructed by RPC)
for the Defendant

Hearing dates: 16 and 18 February 2021

Approved Judgment

Mr Justice Julian Knowles:

Introduction

1. This is a claim for libel. The words complained of by the Claimant are contained in fourteen tweets (Publications 1-10 and 12-15) and a YouTube video (Publication 16). The Defendant admits publication. For reasons I will come to, Publication 11 is no longer relied on by the Claimant. The case has a complicated and protracted procedural history. The papers before me on this PTR run to several thousand pages. There are several sets of written submissions from both sides and a number of different versions of the pleadings upon which I was being asked to adjudicate, some which were served shortly before, and even during, the hearing. I also received further submissions and substantial further documentation after the hearing.
2. The PTR was ordered by Nicol J on 4 February 2021. He was keen to emphasise that the PTR should bring finality to the pleaded cases, and the evidence which would be admitted to prove those cases. Once the ambit of the Defence is ascertained (in whatever amended form), a reliable trial estimate can be given and a trial listing obtained.
3. Nicol J's order provided for the determination of a number of applications, but in the event the only ones I am required to decide are as follows:
 - a. The Claimant's First Amendment Application, dated 14 July 2020:
 - (i) The first part of this is an application by the Claimant to add Publications 12 to 16 to the Claim Form. In their original form, the Particulars of Claim (POC) referred to Publications 1 – 10. These were served in May 2019. After that, the Defendant published Publications 12 – 16. In late 2019 the Claimant circulated draft Amended POC (APOC) containing Publications 11 – 16. The Defendant consented to these amendments in December 2019. For reasons I will explain, no application was made by the Claimant at that time to amend the Claim Form to match the APOC. The part of the First Amendment Application therefore seeks to achieve consistency between the APOC and the Claim Form so that the same publications are set out in each.
 - (ii) The second part is an application dated 8 February 2021 to amend the First Amendment Application (if necessary) to add an argument based on s 32A of the Limitation Act 1980 (LA 1980).
 - b. The Claimant's Third Amendment Application, dated 23 November 2020:
 - (i) This seeks to remedy discrepancies in the time stamps of Publications 1 – 10, as between the times pleaded in the APOC when the tweets were said to have been sent, and the times given for these tweets on the Claim Form.
 - c. An application by the Claimant to strike-out:
 - (i) parts of the draft Re-Amended Defence. The version of this pleading I have worked from was supplied to me in an electronic file called 'UPDATED 170221 Appendix C Claimant's colour coded revised draft ReAmDef with

key v3.’ I will call this ‘Appendix C’. The passages in dispute, with each party’s summary position on them, is contained in an Agreed Table contained in a bundle which was supplied by the Claimant after the hearing. (Confusingly, the version of this pleading in the bundle as Item 9 on the Index is entitled ‘second version’, however it appears to be the same as the ‘v3’ Appendix C version I have already referred to).

- (ii) parts of the Defendant’s Third Witness Statement of 12 February 2021. In line with the relevant file name, I will call this ‘Appendix B’. Subject to these objections, the Claimant does not object to the Defendant’s late application to serve this statement and for relief from sanctions (Supplementary Skeleton Argument, [56]).
 - d. An application by the Defendant to re-amend his Amended Defence. There is no formal application to re-amend, but the Claimant is not insisting (Claimant’s Closing Submissions, [14(a)(iii)]). There is an overlap between this application and the Claimant’s strike-out application in relation to this pleading.
4. There are various costs matters which will fall to be dealt with on a later occasion (Claimant’s Closing Submissions, [3]).

Factual and procedural background

5. The factual background to this claim involves cryptocurrencies and blockchain. A cryptocurrency is a digital asset designed to work as a medium of exchange, in which individual coin ownership records are stored in a ledger existing in a computerised database using cryptography to secure transactions, to control the creation of additional coins, and to verify the transfer of coin ownership. It does not exist in physical form (as paper money does) and is typically not issued by a central authority. Bitcoin is probably the best-known cryptocurrency. A blockchain is a list of digital records, called blocks, that are linked together using cryptography. In simple terms, blockchain is the technology that enables the existence of cryptocurrencies like Bitcoin.

The Claimant’s case in outline

- 6. The following is taken mainly from the APOC. It is not agreed but gives a flavour of the Claimant’s case.
- 7. The Claimant is an Australian computer scientist and businessman based in England and Wales. He is active within the cryptocurrency sphere, running a number of cryptocurrency and blockchain businesses.
- 8. The Defendant is a podcaster and a blogger who specialises in publishing content about Bitcoin and other cryptocurrencies, including on Twitter, where he has tens of thousands of followers. He also describes himself as a journalist.
- 9. Satoshi Nakamoto is the name used by the person or persons who developed Bitcoin and published some of the first work about it and about blockchains. It is presumed to be a pseudonym. The identity of Satoshi Nakamoto is a topic of considerable interest

in the cryptocurrency community. In this judgment I will refer to this person or group as ‘Satoshi’.

10. In summary, the Claimant says that the Defendant’s publications accused him of having fraudulently claimed to be Satoshi, and that they caused him serious harm as a consequence, both to his reputation generally and also in specific ways (eg, that they resulted in him being disinvited from conferences).
11. I will not set out all of the publications in issue, but just give a few examples to give the flavour of the Claimant’s case. In the following paragraphs the times of publication are as given in the APOC.
12. On 29 March 2019 at 8:17pm the Defendant published a tweet (Publication 1, APOC [4] et seq). This began with a re-tweet by the Defendant of a tweet by someone called Calvin Ayre:

“Craig [Wright, ie, the Claimant] has started filing lawsuit against those falsely denying he is Satoshi they can all have a day in court to try to prove their fake case but the judge will rule that Craig invented Bitcoin because he did and he can prove it.”

13. Below this was another tweet by Calvin Ayre which the Defendant included in his tweet:

“Calvin Ayre @CalvinAyre

yup ... Dr Craig Wright is Satoshi Nakamoto ... and #BSV is the only real #Bitcoin. All others are attacking Craig to sell their dysfunctional snake oil crypto products. Craig has proven this to me directly in a number of ways.”

14. The Defendant then wrote:

“Replying to @Calvin Ayre

Can I go first?

Craig Wright is not Satoshi
Craig Wright is not Satoshi ...”

15. The phrase ‘Craig Wright is not Satoshi’ was then repeated a number of times by the Defendant in the tweet.
16. In [5] of his APOC the Claimant alleges that by way of innuendo these words meant and were understood to mean that he had fraudulently claimed to be Satoshi.
17. The following Particulars of Innuendo are then pleaded:

“5.1 The individual, or group of individuals behind the pseudonym Satoshi Nakamoto (‘Satoshi’) is/are generally

accepted within the Bitcoin and cryptocurrency community as the original creator, or one of the original creators, of the cryptocurrency Bitcoin.

5.2. This would have been known to a substantial but unquantifiable number of unidentifiable readers of the First Publication, and these readers would have understood the words complained of herein to bear the meaning set out above.”

18. On 10 April 2019 at 1:47pm the Defendant published a tweet (Publication 2, APOC [6] et seq):

“[retweet of a tweet by @CalvinAyre]:

Calvin Ayre @CalvinAyre Apr 10

[photograph of the Claimant in a group]

Craig and I polishing our muskets at today's Troll Hunting meeting in London. #Craigis-Satoshi.

...

[tweet by the Defendant]:

Replying to @CalvinAyre

‘Craig Wright is not Satohis! [sic] When do I get sued ?’”

19. Paragraph 7 essentially repeats [5]. The following Particulars of Innuendo are then given. Paragraph 7.1 repeats [5.1]. Paragraphs 7.2 and 7.3 aver:

“7.2. On and prior to 10 April Calvin Ayre had made it publicly known that the Claimant was intending to bring proceedings for libel against individuals who had alleged on Twitter that the Claimant had fraudulently claimed to be Satoshi.

7.3. The photograph which featured in the Second Publication was of the Claimant, Calvin Ayre and a group of lawyers. The reference to ‘Troll Hunting’ in the Second Publication was a reference to the pursuit by means of libel proceedings of those who had ‘trolled’ the Claimant on Twitter by accusing him of falsely claiming to be Satoshi Nakamoto.”

20. Publication 12 (APOC, [24C] et seq) is pleaded as follows:

“24C. On 22 August 2019 at 4:54 am the Defendant first published a tweet (‘The Twelfth Publication’). The Twelfth Publication remains online and is accessible via the following url ... In the Twelfth Publication the Defendant published or caused

to be published the following words which referred to and were defamatory of the Claimant:

‘CSW is getting better at fraud, he's learned about metadata now, just not mastered it.

With the white paper he amended it in 2008 while the creation date is 2009. Nice try Craig, keep working on these fakes, you'll master it eventually.

Dear all. Could I please encourage you all to *download* Craig Wrights version of the Bitcoin White paper to your thumb or hard drive. I will explain later. I have archived it so you can choose to download from either source.’

24D. In their natural and ordinary meaning the said words meant and were understood to mean that the Claimant had fraudulently claimed to have written the Bitcoin White Paper.”

21. Publication 13 is pleaded as follows:

“24E. On 28 August 2019 at 5:13 pm the Defendant first published a tweet (‘The Thirteenth Publication’). The Thirteenth Publication remains online and is accessible via the following url ... In the Thirteenth Publication the Defendant published or caused to be published the following words which referred to and were defamatory of the Claimant:

‘Faketoshi' s vision
The art of fraud
Craig Wright
Foreword by bum beard Calvin.’

24F. By way of innuendo, the said words meant and were understood to mean that 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.”

22. The following Particulars of Innuendo are then pleaded:

“24F.1. Paragraph 5.1 above is repeated.

24F.2. The phrase ‘Faketoshi’ is a synthesis of the words 'Fake' and 'Satoshi'.

24F.3. These facts and matters would have been known to a substantial but unquantifiable number of unidentifiable readers of the Thirteenth Publication and these readers would have understood the words complained of herein to bear the meaning set out above.”

23. Publication 16 (APOC [24K] et seq) consists of words spoken by the Defendant during a video discussion on 18 October 2019 hosted by someone calling himself 'Hotep Jesus'. The video is available on YouTube. The words complained are as follows:

“The reality is, is Bitcoin is king. Like, you can do what the fuck you want with BSV; it's dead, it's already dead. The market's voted, it's dead. If you're going to put your time at it, it's dead. The price is going to die; it's -- the only thing keeping it afloat, is Calvin's money; that's literally it. Add to that, you are supporting a bunch of people who are liars, frauds and morons. Craig Wright is a fucking liar, and he's a fraud; and he's a moron; he is not Satoshi. He can come at me in the fucking UK, he can take me to Court; he can come with his -- his fucking billions of dollars; I don't give a shit, come at me. Sue me, I don't give a fuck; you're still a liar, you're still a fraud, and you're still a moron.”

24. In [24N] the Claimant avers by way of innuendo the said words meant and were understood to mean that the Claimant had fraudulently claimed to be Satoshi Nakamoto. Particulars of Innuendo are then given which are the same (*mutatis mutandis*) as those given for Publication 1.
25. In summary, therefore, the Claimant's case is that the publications complained of alleged that he is a liar who has made fraudulent claims to be Satoshi and they have caused him serious harm.
26. The Claimant's case on serious harm (*per s 1* of the Defamation Act 2013 (DA 2013)), damages, and remedies is pleaded at [25] et seq of the APOC. He alleges that it is a matter of obvious inference that the words complained of have caused or were likely to cause serious harm to his reputation.
27. At [25.1] the following is pleaded:

“25.1 The imputations complained of are inherently serious in terms of their propensity to cause harm to the reputation of the Claimant, and the probability is that publication of such imputations in relation to the Claimant would have this result. They go to the heart of his personal reputation for honesty and ethical conduct and, given his involvement within the cryptocurrency industry, to the heart of his professional reputation. No retraction or apology has been published, and so readers of the tweets complained of continue to believe that the Claimant is guilty of the conduct alleged.”

28. Without prejudice to the generality of this averment, the Claimant alleges that:
- a. the imputations complained of are inherently serious in terms of their propensity to cause harm to his reputation, because they go to the heart of his personal reputation for honesty and ethical conduct and, given his involvement within the cryptocurrency industry, to the heart of his professional reputation.

- b. the publications complained of were widely published to any internet user, without subscription or registration. The Claimant therefore invites the inference that a very substantial number of readers viewed the publications.
29. At [25.9] the Claimant alleges that his reputation within the academic community and the computer science, cryptocurrency and financial technology industries has been seriously harmed by the publications complained of. He also says he has suffered specific harm, for example, the withdrawal of invitations to speak at numerous academic conferences in the period immediately following publication. Details of these conferences are given at [25.9.1] et seq.
30. He goes on to allege at [25.9.4] that as a result of his exclusion from conferences, he has been unable to present or publish his academic work, which has led to considerable difficulties for him in pursuing academic opportunities. He wishes to develop an academic career in England but needs to demonstrate the recent publication of academic papers to obtain such positions. At [25.9.5] he also alleges that his inability to publish academic papers has had a detrimental impact upon the value of the patents which he has filed.
31. Further, at [25.10] the Claimant alleges that the publication of the words complained of has made it more difficult for him to achieve his ambition of becoming a magistrate in Surrey. He avers that any application he made for such a position would be severely compromised by the existence in the public domain of the words complained of, given that they allege serious dishonesty on his part. After publication began, the Claimant therefore abandoned the application he had started making for the position of magistrate, assuming that the application was now hopeless.
32. At [26] he alleges that in addition to the serious harm caused to his reputation by the publication and republication of the publications complained of, the Claimant has suffered considerable distress and embarrassment.

The Defendant's case in outline

33. For reasons which will become clear, it is important to emphasise that in his Amended Defence dated 18 March 2020 the Defendant pleaded to all 16 publications then relied on by the Claimant in his APOC, even though, at that stage, the Claim Form only listed Publications 1 - 10. The Defence was amended by consent pursuant to CPR r 17.1(2)(a). I will use the past tense to describe this pleading because, as I shall explain, large parts of it have subsequently been abandoned by the Defendant.
34. At [3] the Defendant pleaded that the Claimant is supported in these proceedings by Calvin Ayre, a Canadian businessman domiciled in Antigua. Mr Ayre carries on in business in online gambling. In November 2018 the Claimant and Mr Ayre established a new cryptocurrency called 'Bitcoin SV'/'BSV' (standing for 'Bitcoin Satoshi Vision'), which had Mr Ayre's financial backing. The Defendant alleged that Mr Ayre has been the public face of the Claimant's threats to bring legal proceedings against the Defendant and others in this jurisdiction. Paragraph 3A alleges that these proceedings are being controlled by Mr Ayre/a company associated with him called EITC/or other third parties and the Claimant is merely a nominal claimant.

35. The Defendant admitted publication of the 15 tweets on the specified dates; admitted that they referred to the Claimant; but denied that they were defamatory of the Claimant in the sense that they caused or were likely to cause serious harm to his reputation.
36. In subsequent paragraphs the Defendant also denied the various meanings pleaded by the Claimant. As I have said, defences were pleaded in respect of all 16 publications contained in the APOC as filed and served in December 2019.
37. At [18] the Defendant denied that the publications complained of or any of them have caused or are likely to cause the Claimant serious harm to his reputation whether as alleged in [25] of the APOC, or at all.
38. In [18.9.1.1] he alleged that it was inherently unlikely that the Claimant's reputation within the academic community and the computer science, cryptocurrency and financial technology industries had been seriously harmed as a result of the publications complained of. All, or the vast majority, of those operating within those spheres (and particularly those who came into contact with the Claimant) would have learnt of the notorious allegation that the Claimant had fraudulently claimed to be Satoshi, which arose out of his failed promises to prove he was Satoshi.
39. At [18.9.2] the Defendant did not admit that any invitations to speak at conferences were withdrawn. Paragraphs [18.9.6] and [18.10] denied that the Claimant's allegation that he had lost academic opportunities or been unable to become a magistrate were proper pleas.
40. At [19] the following was pleaded:

“19. The contention in paragraph 25.1 (which is denied), that the imputations complained of are inherently serious as a matter of obvious inference, ignores the critical overarching context in this case, as well as the requirement that the Claimant show serious harm as a matter of actual provable fact. All or at least a very large majority of the readers and viewers of the publications complained of, being people with a particular and/or specialist interest in the Bitcoin and cryptocurrency sector, would have known the historic context for the Defendant's allegation that the Claimant was variously ‘not Satoshi’ or ‘a fraud’ or ‘repeatedly and fraudulently claimed to be Satoshi’, namely that summarised in paragraphs 7.1 to 7.4 above. In other words, the allegation – and its basis in the Claimant's failed promises to prove he was Satoshi Nakamoto – was notorious and had been the subject since May 2016 of continuous widespread global publication within the Bitcoin and cryptocurrency sector and in mainstream media, and had thereby become an inherent part of the Claimant's global public reputation. If necessary, the Defendant will refer to the mass of statements published worldwide, including in this jurisdiction, between 2016 and today which demonstrate this ...”

41. At [20] et seq the Defendant also alleged that the claim was an abuse of process. At [20.1] he alleged that the claim was not a genuine claim by the Claimant for vindication of his reputation, but was being run by third parties (and in particular Mr Ayre) for commercial gain. At [20.1] it was alleged that the claim was being brought with the purpose of bankrupting the Defendant. At [20.3] it was said to be capable of reasonable inference that the Claimant, and Mr Ayre and/or other third parties, were seeking to use these and other proceedings in this jurisdiction as a means of stoking global publicity in relation to the Claimant's claim to be Satoshi.
42. At [21] the Defendant relied on the defence of truth in s 2 of the DA 2013. He averred that the words complained of, if and in so far as, in their proper context, they respectively bore or were understood to bear the following imputation by way of innuendo, those statements were substantially true:

“... that the Claimant's claim to be Satoshi Nakamoto (the pseudonymous person or one of the group of people who created Bitcoin) was fraudulent, in that it was a lie, as demonstrated by his own failed promises to provide cryptographic proof of that claim.”
43. At [22] it was pleaded in the alternative, if and in so far as the words complained of respectively bore or were understood to bear the imputation pleaded by the Claimant in [5] of his APOC, namely, that the Claimant had fraudulently claimed to be Satoshi, that is to say the person, or one of the group of people, who developed Bitcoin, they were substantially true. Further, if and in so far as the statement complained of in paragraph 24C bore or was understood to bear the imputation pleaded by the Claimant in [24D], that the Claimant had fraudulently claimed to have written the Bitcoin White Paper (ie, *Bitcoin: A Peer-to-Peer Electronic Cash System*, a paper published by Satoshi in October 2008), that meaning was substantially true. Extensive particulars were then pleaded.
44. At [23] the Defendant pleaded, further or alternatively, that the statements complained of were or formed part of statements on a matter of public interest and the Defendant reasonably believed that publishing the statements complained of was in the public interest pursuant to s 4 of the DA 2013.
45. At [37] the Defendant denied that the Claimant has suffered distress or embarrassment as a consequence of the Defendant's publications, and in [39] he set out matters to be relied upon in mitigation of damages.
46. In summary, therefore, the Defendant relied on the following defences in his Amended Defence:
 - a. No serious harm, and therefore the publications were not defamatory ([18]-[19]);
 - b. Abuse of process ([20]);
 - c. Truth ([21]-[22]);
 - d. Public interest ([23]-[36]);

e. Absence of any distress or embarrassment ([37]).

47. I will set out the events which occurred following the service of the Amended Defence in the next section.

Discussion

(i) Third Amendment Application (the timestamp issue)

48. It is convenient to begin with the Claimant's Third Amendment Application, which is not opposed by the Defendant. It is made pursuant to CPR r 17.2(1)(b). The evidence in support is set out in the Eighth Witness Statement of the Claimant's solicitor, Mr Cohen, dated 23 November 2020.

49. At the hearing on 23 November 2020 Nicol J noted differences in the times of the first ten tweeted publications as between the Claim Form and the APOC. For example:

a. Publication 1 is pleaded in the APOC as having been sent at 8.17pm on 29 March 2019; on the Claim Form (and on the tweet itself), the time is given as 1.17pm, ie, seven hours earlier.

b. Publication 2 is pleaded in the APOC as having been sent at 1.47pm on 10 April 2019; on the Claim Form (and on the tweet), the time is given as 5.47am, ie, eight hours earlier.

50. In fact, each of Publications 2 to 10 has an eight-hour time discrepancy with the time on the Claim Form being eight hours earlier than the time pleaded in the APOC.

51. To put this application into context, the following information is relevant:

a. Twitter is headquartered in California in the United States.

b. California operates Pacific Standard Time (PST) and Pacific Daylight Time (PDT). PDT is daylight savings time and is one hour ahead of PST. The change from PST to PDT takes place in the spring. They are respectively analogous to Greenwich Mean Time (GMT) and British Summer Time (BST) in the UK.

c. PST is eight hours behind GMT. PDT (ie, PST+1) is seven hours behind GMT. PDT is eight hours behind BST (ie, GMT+1).

d. In 2019, California moved from PST to PDT at 2:00 PST on 10 March 2019.

e. The UK moved from GMT to BST at 1:00 GMT on 31 March 2019, some three weeks later than California's move to PDT.

f. Thus, between 10:00 GMT on 10 March 2019 and 1:00 GMT on 31 March 2019, California time (which by then was on PDT) was seven hours behind the UK (which was still on GMT).

52. Mr Cohen attempted to unravel the discrepancy, and [9] of his Eighth Witness Statement explains that what appears to have happened is as follows:

- a. The dates and times of publication were produced online to the drafter of the Claim Form in PDT in respect of the first ten publications. Mr Cohen was not able to ascertain with any certainty the reason for this timestamp. Because Twitter is based in California, Mr Cohen believes that the time given on the tweets as the drafter originally saw them may have defaulted to the relevant California time zone.
 - b. When the drafter inserted the timestamps while pleading the POC (which were dated 2 May 2019, a couple of weeks after the Claim Form was issued) they appeared to have had to hand, or been shown, timestamps which appeared in GMT (in respect of the first publication, dated 29 March 2019) and BST (in respect of the second to tenth publications, which post-dated 31 March 2019). This may have been because the person who generated those timestamped publications, or perhaps the drafter themselves, had a Twitter account which, Mr Cohen understands when logged in and based in the UK, would have displayed timestamps generated using GMT or BST rather than PDT.
53. Mr Cohen says the fact that the time given for First Publication in the Claim Form is seven hours behind its equivalent in the APOC, whereas the Second to Tenth Publications are all eight hours behind, suggests that the times in the APOC are the relevant UK time (first GMT, then BST) on the date the tweet was sent, and the times in the Claim Form are PDT.
54. Mr Cohen emphasises that the amendments proposed in the Third Amendment Application do not materially change anything but merely serve to remove the discrepancy in the timestamps that Nicol J identified.
55. On behalf of the Claimant, Mr Wolanski QC submitted that whether to allow an amendment is an exercise of the court's discretion, with such discretion to be exercised in accordance with the overriding objective: *Salt Ship Design AS v Prysmian Powerlink SRL* [2019] EWHC 2308 (Comm), [65]-[68]. He said that given the Defendant: (a) pleaded a defence to Publications 1 to 10; (b) admitted responsibility for publishing them in [6] of his Amended Defence; (c) received copies of them pursuant to CPR r 31.14 on 1 August 2019; and (d) had never taken a point about the discrepancies in timings before they were noticed by Nicol J, it cannot be said that the Defendant would suffer any prejudice if I were to allow these amendments.
56. As I have said, the Defendant does not oppose this application, and I grant it. It is technical in nature, there is no prejudice to the Defendant, and it is obviously desirable that there should be consistency in the timings of the publications between the Claim Form and the APOC so there is no room for confusion, even though no-one has suggested that anything in particular turns on the time stamps.

(ii) The First Amendment Application

57. Next, I deal with the Claimant's First Amendment Application. This is more complex, and requires an examination of what happened in the litigation after the Amended Defence was served in March 2020.

58. I am concerned with two aspects of the First Amendment Application (there are other parts I am not concerned with):
- a. Firstly, his application to amend the Claim Form to add Publications 12 to 16.
 - b. Second, his application of 8 February 2021 to amend the application notice of 14 July 2020 (if necessary) for an order that the one-year limitation period in s 4A of the LA 1980 be disapplied pursuant to s 32A in relation to Publications 12 to 16.
59. The evidence in support is contained in Mr Cohen's Second, Eighth and Eleventh Witness Statements.

Background

60. The first ten publications were published between 29 March 2019 and 16 April 2019. The Claim Form was served on 17 April 2019 listing those ten publications and claiming damages for libel and other relief. The POC containing Publications 1 – 10 were served on 2 May 2019.
61. Publication 11 took place on 19 June 2019. On 8 August 2019 the Defendant served his Defence. Publications 12 to 15 then took place between 22 August and 29 September 2019. The Claimant's Reply was served on 11 October 2019. Publication 16 took place on 18 October 2019.
62. Draft APOC were circulated by the Claimant's solicitors on 19 November 2019 to add Publications 11 to 16. The Defendant consented to those amendments on 19 December 2019, and the APOC were filed and served the same day pursuant to CPR r 17.1(2)(a).
63. In March 2020 there was a CCMC before Master Davison and extensive directions were given. On 18 March 2020 the Defendant served his Amended Defence, which as I have said was done with consent, in which he pleaded to Publications 11 – 16.
64. In his Eleventh Witness Statement Mr Cohen explains that when the draft APOC were circulated by his firm in late 2019, through an 'administrative oversight', his firm did not also prepare or circulate a draft amended Claim Form to include Publications 11 to 16. This error was not spotted by the Claimant's legal team, including during preparations for the March 2020 CCMC, or by the Defendant when he was preparing his draft Defence in respect of all 16 publications.
65. Hence, by early 2020 the position was that there was an APOC, an Amended Defence and an Amended Reply (dated 22 April 2020) dealing with all 16 publications, each of which had been consented to by the other party, but a Claim Form which only contained Publications 1 – 10.
66. According to Mr Cohen, this oversight was first spotted by the Claimant's team in about May 2020 when the addition of a data protection claim was being considered, but it was not at that stage specifically drawn to the Defendant's attention.
67. The application to amend the Claim Form was issued on 14 July 2020. Further confusion was added when the Claimant's solicitors erroneously enclosed in draft a 'Re-Amended Claim Form', containing proposed amendments in red and green, when

it should just have been a draft ‘Amended Claim Form’, containing one set of proposed amendments in red. (This application also sought other amendments, eg, to add the data protection claim, however I am not concerned with those).

68. Mr Cohen’s Eleventh Witness Statement explains what happened after the Claimant had served the 14 July 2020 application notice. By that stage the CCMC had been restored for hearing before Master Dagnall on 30 July 2020 to deal with disclosure issues. On 15 July 2020 the Defendant’s solicitors wrote to the Claimant’s solicitors indicating that they did not consent to the First Amendment Application and that they would be applying to strike out the claim.
69. I need not go into all the details, but the upshot of exchanges between the parties and the hearings before Master Davison and Master Dagnall in July 2020 was that the disclosure issues were put off and it was agreed that the First Amendment Application and the Defendant’s strike-out application would be listed for hearing together before a judge of the Media and Communications List. It was agreed two days would be necessary and that the hearing would not take place before November at the earliest. In the event, the hearing was listed for 23-24 November 2020 before Nicol J. The Defendant’s solicitors consented to the hearing going off until then.
70. The delay in the hearing of the First Amendment Application until November 2020 had the consequence that the limitation period of one year for claims in defamation (see s 4A, LA 1980) expired in relation to Publications 12 – 16 in the period from 22 August 2020 onwards. The limitation period for Publication 11 had already expired by the time the First Amendment Application was made on 14 July 2020. I will return to this later.
71. On 23 October 2020, the Defendant’s solicitors wrote to the Claimant’s solicitors to inform them that the Defendant was: (a) withdrawing his strike out application; and (b) abandoning his entire Defence and would no longer be defending the claim.
72. In response, the Claimant’s solicitors wrote to the Defendant’s solicitors asking a number of things including whether he would: (a) consent to judgment being entered against him with damages to be assessed; and (b) consent to the First Amendment Application.
73. The Defendant’s solicitors replied on 6 November 2020 saying (*inter alia*) that the Defendant would not consent to judgment being entered, but he did not (now) object to the First Amendment Application.
74. On 10 November 2020, the Claimant applied for summary judgment and requested that the hearing of that application be listed for the November hearing, in place of the Defendant’s strike-out application and the Claimant’s First and Second Amendment Applications. (I am not concerned with the Second Amendment Application.) That request was granted.
75. The Defendant did not attend, nor was he represented at, the November hearing before Nicol J. As I explained earlier, it was at that hearing that Nicol J drew attention to the timestamp issue. Accordingly, on 23 November 2020 the Claimant made the Third Amendment Application. Also, given the Defendant’s decision not to

continue to substantively defend the claim, the Claimant withdrew his data protection claim.

76. During that hearing Mr Wolanski QC for the Claimant abandoned reliance on Publication 11, accepting that the limitation period had already expired by the time the First Amendment Application was made on 14 July 2020. As I have explained, by then, the limitation period for Publications 12 to 16 had also expired. Mr Cohen is candid that the full implications of this did not fully register with the Claimant's legal team at the time.
77. Applications to amend – and whether they are made ‘in time’ for the purposes of limitation – are not judged as at the date that the application is *issued*, but the date the application is *determined*: *Bajwa v Furini* [2004] 1 WLR 1971, [20]; *Welsh Development Agency v Redpath Dorman Long Limited* [1994] 1 WLR 1409, 1421; *Paragon Finance plc v DB Thackerar & Co* [1999] 1 All ER 400, 405; *White Book* 2021, [17.4.2].
78. Thus, by the time of the hearing before Nicol J on 23 November 2020, the Claimant was seeking to amend the Claim Form by adding publications for which the limitation period had expired.
79. Although Publications 11 – 16 are now, legally, all in the same procedural position, the limitation period having expired for all of them, Mr Cohen explains in his Eleventh Witness Statement that the Claimant has taken a pragmatic decision not to try and rely on Publication 11, given Mr Wolanski's indication before Nicol J. So it is that the Third Amendment Application before me just concerns Publications 12 - 16.
80. The result of the hearing before Nicol J was that directions were given for a two-day trial, and the Claimant's First and Third Amendment Applications were adjourned to be heard at the start of the trial. The trial was subsequently listed for 16 and 17 February 2021. At that stage it was assumed that the Defendant would not engage with the trial and that the Claimant would simply be required to prove his case.
81. However, having said in effect that he would not engage further with the proceedings, in his Pre-Trial Checklist of 11 December 2020 the Defendant indicated that he would, in fact, now be defending the case and would be representing himself at trial. On 22 December 2020, he filed his First Witness Statement with 1015 pages of exhibits and instructed solicitors and counsel to produce a Skeleton Argument for the trial (having said that his reason for disengagement was due to impecuniosity). He also refused to agree to the strike-out from his Amended Defence of the positive defences he had indicated he would no longer be relying on (ostensibly because it was ‘too late’ to do so). He indicated that while he would be appearing in person at trial, he would not be cross-examining the Claimant and wanted only a short time to make oral submissions.
82. In response, the Claimant applied on 12 January 2021 to ‘re-purpose’ the listed two-day trial as a PTR. The matter came before Nicol J on 4 February 2021, and he made the order to which I have already referred.

Submissions

83. In support of his application to amend the Claim Form to include Publications 12-16, Mr Wolanski on behalf of the Claimant submits as follows.
84. The expiry of the limitation period for Publications 12 - 16 brings into play the principles which apply where a court is asked to allow an amendment to a statement of case which has the effect of adding to an existing action a new claim in respect of which the limitation period has expired.
85. The starting point is the LA 1980, s 35(1) of which provides:

“35 New claims in pending actions: rules of court.

(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced -

(a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and

(b) in the case of any other new claim, on the same date as the original action.”

86. Section 35(2) provides:

“(2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either -

(a) the addition or substitution of a new cause of action; ...”

87. In *HM Commissioners of Revenue and Customs v Begum* [2010] EWHC 1799 (Ch), [29]-[30], David Richards J said:

“Section 35 and CPR 17.4 refer to ‘a new claim’ and to a ‘claim already made’, and s 35 refers also to ‘a claim involving a new cause of action’. For present purposes, a claim is a new claim only if it involves ‘the addition or substitution of a new cause of action: s 35(2)(a). The authorities establish that ‘cause of action’ carries the meaning given by Diplock LJ in *Letang v Cooper* [1965] 1 QB 232, 242-3:

“... simply a factual situation the existence of which entitles one party to obtain from the court a remedy against another person ... [as distinct from] a form of action ... used as a convenient and succinct description of a particular category of factual situation”.

So, an amendment to include a claim for damages in negligence for personal injuries on facts already pleaded where the claim in respect of the injuries had been pleaded as a claim for damages in trespass to the person would not involve a new cause of action.

In *Lloyds Bank plc v Rogers* [(No.2) [1999] 3 EGLR 83] Auld LJ noted that what makes a new claim as defined in s 35(2) is ‘not the newness of the claim according to the type or quantum of remedy sought, but the newness of the cause of action which it involves.’ After referring to Diplock LJ’s dictum in *Letang v Cooper*, Auld LJ continued:

‘... It makes plain that a claim and a cause of action are not the same thing. It follows, as Mr Croally argued, that an originally pleaded ‘factual situation’ may disclose more than one cause of action, although one of them may not be individually categorised as such or the subject of a claim for a separate remedy. However, as Mr Browne-Wilkinson submitted, it does not follow that a claim so categorising it and/or seeking a remedy for it made for the first time by amendment is the addition of a new cause of action so as to render it a new claim.

That the draftsmen of section 35 and Ord 20 r 5 had the distinction in mind is underlined by their respective provision for new claims by reference to substituted new causes of action, as well as additional new causes of action. The remedy claimed – ‘any claim’ – may or may not be the same; what makes the claim ‘a new claim’ is the newness of the substituted cause of action. Thus, a claim for damages is a new claim, even if the same amount as originally claimed, if the claimant seeks, by amendment, to justify it on a different factual basis from that originally pleaded. But it is not, even if made for the first time, if it does not involve the addition or substitution of an allegation of new facts constituting such a new cause of action.’

Lloyds Bank v Rogers was a decision of a two-judge constitution of the Court of Appeal (Auld and Evans LJJ) and, while they differed on the issue as to whether the amendment introduced a claim involving a new cause of action, there was I think no disagreement on Auld LJ’s statement of the underlying principles. In any event, the statement was cited with approval by the Court of Appeal in *Aldi Stores Ltd v Holmes Buildings plc* [2003] EWCA Civ 1882.

30. Thus, ‘claim’ in the phrase ‘any claim involving ... a new cause of action’ refers to the remedy sought, while ‘cause of action’ refers to the factual basis for the claim. Whilst the distinction is clear, it might be thought to lead to some tautology when applying the test in s 35(5)(a) as to whether ‘the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action’. The answer lies in treating ‘cause of action’ as those facts relied on in the statement of case as giving rise to a

particular legal result and remedy. A change in the remedy may change the claim, but not the cause of action. A change in the essential features of the factual basis (rather than, say, giving further particulars of existing allegations) will introduce a new cause of action, but it may be permitted under s 35(5)(a) and CPR 17.4(2) if the facts are the same or substantially the same as those already in issue. I will return later to those provisions.

31. As well as referring to *Letang v Cooper*, Millett LJ in *Paragon Finance plc v DB Thackerar & Co* [1999] 1 All ER 400 at 405 cited ‘the classic definition’ of a cause of action given by Brett J in *Cooke v Gill* (1873) LR 8 CP 107 at 116:

‘Cause of action’ has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed, - every fact which the defendant would have a right to traverse.’

Millett LJ continued:

‘... I do not think that Diplock LJ was intending a different definition from that of Brett J. However it is formulated, only those facts which are material to be proved are to be taken into account. The pleading of unnecessary allegations or the addition of further instances or better particulars does not amount to a distinct cause of action. The selection of the material facts to define the cause of action must be made at the highest level of abstraction. ...’

32. This passage was commented on by Peter Gibson LJ in *Savings and Investment Bank v Finken* [2001] EWCA Civ 1639 at para 30:

‘As I see it, the exercise which is required is the comparison of the pleading in its state before the proposed amendment and the pleading in its amended state. I do not think that it assists to look at the endorsement on the writ (see *Steamship Mutual* at p 97 per May LJ). What must be examined is the pleading of the essential facts which need to be proved. To define the cause of action the non-essential facts must be left out of account as mere instances or particulars of essential facts. That is what I understand Millett LJ to have meant by stating that the selection of material facts must be made at the highest level of abstraction. Thus, to take the example provided by the facts in *Letang v Cooper* [1965] 1 QB 232, [1964] 2 All ER 929 discussed by Millett LJ at p405 of the former report, the facts material to be proved to constitute the cause of action for trespass to the person did not include whether the trespass was intentional or unintentional.’

The exercise to be undertaken in deciding whether there is ‘a new claim’ as defined in s 35(2) is therefore to compare the essential factual elements in a cause of action already pleaded with the essential factual elements in the case of action as proposed. If they are the same, there is no new cause of action and therefore no new claim.”

88. Thus, in the phrase ‘any claim involving ... a new cause of action’ in s 35(2)(a), ‘claim’ refers to the remedy sought, and ‘cause of action’ refers to the factual basis for the claim: see, generally, *White Book 2021*, Vol 2, [8-110].

89. Section 35(3), (4) and (5) provides:

“(3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim.

(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.

(5) The conditions referred to in subsection (4) above are the following -

(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; ...”

90. The court has a general power to amend under CPR r 17.(2)(b), but this is subject to CPR r 17.4, which is the rule of court referred to in s 35(4). It provides:

“Amendments to statements of case after the end of a relevant limitation period

17.4

(1) This rule applies where –

(a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and

(b) a period of limitation has expired under –

(i) the Limitation Act 1980;

...

(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.”

91. This wording differs from that of s 35(5)(a), as it is narrower, a result contemplated in s 35(4) (‘... subject to any further restrictions the rules may impose.’) CPR r 17.4(2) requires the new claim to arise out of the cause of action relied on by the applicant for the amendment, ie, *the facts already pleaded and relied on by the party seeking to amend*, whereas s 35(5)(a) does not contain this restriction. However, in *Goode v Martin* [2002] 1 WLR 1828 the Court of Appeal held that the principle of construction in s 3(1) of the Human Rights Act 1998 applies, so that CPR r 17.4 must be interpreted and applied as if it reads as follows, which is similar to the wording of s 35(5)(a):

“... only if the new claim arises out of the same facts or substantially the same facts as *are already in issue* on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.” (Emphasis added)

92. Ms Goode had sustained serious head injuries in a yachting accident which had left her with no memory of it. There were no witnesses on whom she could rely. She had pleaded a case in negligence against the yacht’s captain. He pleaded a defence containing a different set of facts. The claimant sought to amend her pleadings after the expiry of the limitation period to add a claim for negligence based on the defendant’s version of events. The master and judge on appeal struck out her claim. Allowing her appeal, the Court of Appeal restored her claim. Reading the rule in the way indicated by Brooke LJ enabled her to plead by way of post-limitation amendments such that, even if the defendant succeeded in establishing his version of events, she was entitled to damages because, upon such facts, he was negligent as an experienced yacht master in failing to take proper care of her as a novice sailor. He had put the facts in issue for the purposes of the rule as so read when he served his Defence, and thus her new claim arose out of those facts and so fell within the rule.
93. In *Charles Church Developments Ltd v Stent Foundations Ltd* [2007] 1 WLR 1203 Jackson J read the rule (as interpreted in *Goode*) as enabling a claimant to advance a new claim against the First Defendant on the basis of facts that had been pleaded by the Second Defendant. At [33]-[34], he said:

“33 Thus, it can be seen that in *Goode v Martin* [2002] 1 WLR 1828, the Court of Appeal reached its decision on the basis of an expanded version of CPR r 17.4(2). I shall refer to the expanded version of the rule as set out in para 46 of Brooke LJ’s judgment as ‘the expanded rule’.

34. In the course of the hearing yesterday I discussed with counsel whether the expanded rule should always be adopted, or whether that expanded rule only applied in cases with a Human Rights Act 1998 dimension. Both Mr David Friedman, for Charles Church, and Mr David Sears, for Stent, inclined to the view that the expanded rule must generally be used in substitution for the original version of CPR r 17.4(2) as promulgated by the Rule Committee. In particular, for the purposes of the present case both counsel agreed that this court should proceed upon the basis of the expanded rule, rather than the original version of rule 17.4(2). Accordingly, I shall adopt that course.”

94. He explained at [40]:

“Section 35(5)(a) of the 1980 Act provides an exception to the limitation principle. The rationale of this exception is that once particular facts have been put in issue in litigation, and therefore fall to be investigated, the claimant should be entitled to claim any appropriate remedy upon the basis of those facts. This policy justification is equally valid irrespective of whether those facts have been put in issue by D1 or by D2 or by both defendants.”

95. These provisions of the LA 1980 and the CPR potentially raise the question of whether, by seeking to amend the Claim Form to add Publications 12 to 16, the Claimant is seeking to add new claims, and, if he is, whether they fall within CPR r 17.4(2) as arising out of the same facts or substantially the same facts as already are in issue in a claim in which he has already claimed a remedy.

96. Mr Wolanski advanced three alternative submissions in support of the application to amend:

- a. Firstly, he said that the application is merely a ‘clerical step’ to reconcile the Claim Form with the APOC, which at the moment are inconsistent, and that I therefore need not be concerned with the LA 1980 or CPR r 17.4. The amendment does not involve the making of a new claim. That is because the claims were brought and pleaded to by both parties in the APOC, the Amended Defence, and the Amended Reply, and the application is covered by the principle that applications to amend that are made purely to produce consistency between manifestly inconsistent statements of case, in circumstances where the inconsistency has been produced by inadvertent oversight, do not involve the making of a new claim. In support, he relies on *Evans v CIG Mon Cymru Ltd* [2008] 1 WLR 2675, [24]-[26], where the amendment of the Claim Form to correct an ‘obvious mismatch’ with the Particulars of Claim caused by an inadvertent solicitor’s error was permitted.
- b. Second, if the proposed amendment does involve new claims, and CPR r 17.4 applies, then they do arise out of the same facts (or substantially the same facts) which are already in issue, because Publications 12 to 16 have been pleaded to by both the Claimant and the Defendant in their other statements of case, namely the APOC, Amended Defence and Amended Reply.

- c. Third, if necessary, the Claimant asks the Court to exercise its equitable discretion under s 32A of the LA 1980 to disapply the limitation period in s 4A in respect of Publications 12 to 16. That way, even if they constitute new claims, no period of limitation applies and thus no period of limitation has expired, so CPR r 17.4 is not engaged. This submission is reflected in the second part of the First Amendment Application that I referred to earlier.

97. In response, Ms Evans QC on behalf of the Defendant submitted:

- a. *Evans*, supra, is distinguishable. That was a case about construction of the words used to describe an existing claim pleaded on the claim form: see Arden LJ's judgment at [30]. In the present case, the Claim Form does not refer to Publications 12 to 16 at all and there is no proper basis for construing it as if it did.
- b. It is for the Claimant to show that any limitation defence in response to a proposed 'new claim' is not reasonably arguable or that the amendment falls within CPR 17.4(2): *White Book 2021*, [17.4.2]. A proposed amendment to rely on a new publication in a defamation case is likely to amount to the addition of a new claim which does not arise out of the same or substantially the same facts, for the purposes of s 35 LA 1980 and CPR 17.4(2): *Komarek v Ramco Energy Plc*, Unreported, 21 November 2002, (Eady J), [57]-[65]; *Economou v de Freitas* [2016] EWHC 1218 (QB), [49]; *Lokhova v Longmuir* [2017] EMLR 246, [42]-[49]. Publications 12 – 16 involve new causes of action which do not fall within s 35(5)(a) or CPR r 17.4(2). They are different publications made on different days (over a two-month period) and in different words to Publications 1-10.
- c. In relation to the s 32A argument, the Defendant relies on the approach adopted by Eady J in *Komarek*, supra, [67] and *Otuov v Brierley* [2016] EMLR 6, [45], as well as s 35(3) of the LA 1980, in support of his argument that s 32A does not provide a gateway by which a statute-barred new claim can be added under s 35 and CPR r 17.4(2). Even if such a power existed, the Defendant submits that it would be wrong for the court to exercise the discretion under CPR r 17.4(2) and/or s 32A on the present facts. The Defendant relies on what he calls the 'extensive delay' shown by the Claimant in bringing this application.

Analysis

98. I begin with the Claimant's 'clerical error' submission. In *Evans*, supra, the claimant worked in the defendant's meat factory. He sought damages for personal injury following an accident at work on 11 June 2001 when he cut himself with a knife when he was 16. The claim form was issued in the County Court on 7 December 2005. On 24 December 2005 the primary limitation period expired. On 14 March 2006 the claim form, which erroneously gave details of the claim as loss and damage arising out of 'abuse at work', was served accompanied by detailed particulars of claim and a medical report referring to and relating solely to the claimant's knife accident at work. There had, in fact, been an earlier complaint by the claimant about bullying at work which had led to correspondence from his solicitors, but no claim had been proceeded with.

99. As Toulson LJ recorded in his judgment at [10], it was common ground that the incorrect endorsement on the claim form was a purely administrative error by the claimant's solicitors; their instructions and intention had always been to issue proceedings in respect of the accident at work.
100. By an application dated 26 April 2006, the defendant sought an order to strike out the particulars of claim under CPR r 3.4(2) as inconsistent with the claim form. That rule provides:
- “(2) The court may strike out a statement of case if it appears to the court -
- (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
- (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
- (c) that there has been a failure to comply with a rule, practice direction or court order.”
101. In an application dated 6 May 2006 the claimant sought permission to amend the claim form by substituting the words ‘an accident’ for the word ‘abuse’.
102. By order dated 18 September 2006 the district judge refused the claimant's application but granted the defendant's application and struck out the particulars of claim. The judge dismissed an appeal by the claimant. He held that if one compared the original wording of the claim form with the proposed amended wording the latter presented a new claim, and that the amendment of the document was barred by CPR r 17.4.
103. The Court of Appeal allowed the claimant's appeal. The leading judgment was given by Toulson LJ. The relevant parts of his judgment are as follows:
- “3 ... In giving leave, Jacob LJ asked rhetorically, at para 8: ‘Where a claim form read alone wrongly identifies the claim, but when read together with the other documents with which it is served, is clear, why should one say the claim is out of time ?’
4. He went on to observe, at para 9:
- ‘So the legal position may be this: that when what is served in time as a whole makes clear what the claim is for, it is possible to correct the earlier issued unserved claim form, provided there is no abuse of process involved ... It seems to me that this is quite an important question of principle and is therefore worthy of consideration by this court.’”
5. To similar effect, Mummery LJ said, at para 11, that he considered that:

‘there may be a power to amend the claim form which when it is served at the same time as the particulars of claim and the medical report, exhibits an obvious mismatch between what is in the claim form and the particularised case pleaded in the particulars of claim and evidenced by the medical report.’

6. He went on to observe that, in this case, all the documents were served at the same time and it would be obvious to the person receiving them that there was a clear mismatch.”

...

21. The case has been succinctly and attractively argued on both sides. Mr Grace, for the defendant, has faced the harder battle because he has been subjected to more questioning from the court and he presented his case with conspicuous clarity. It is convenient to start by considering the defendant’s application to strike out the particulars of claim, not least because that was the first application before court. Although the application did not formally identify the grounds on which it was made, Mr Grace relies upon paragraphs (a) and (c) of the grounds provided in rule 3.4 for such an application. He puts his argument in this way: in any proceedings the claim is essentially defined by the claim form. The particulars of claim disclosed no reasonable grounds for bringing the claim, as identified in the claim form (namely, a claim for abuse at work), and were therefore to be struck out under paragraph (a). Furthermore, the particulars of claim failed, contrary to the requirements of rule 16, to provide a concise statement of facts on which the claimant relied to support a claim for abuse at work. They said nothing at all about abuse at work. It is, effectively, the same argument in another form. The foundation of it is that the case is to be identified by reference, and only by reference, to the general description of the claim in the claim form, viewed objectively, albeit that the description may, to the knowledge of all parties to the application, have been a pure error.

22. The power of the court to strike out under rule 3.4 is discretionary. Mr Grace accepts that if the claimant’s solicitors had themselves spotted the error at any moment prior to service, the claim form could have been amended under rule 17.1 without application to the court. He does not quarrel with the proposition that the fact that it was spotted only by the defendant has caused it no prejudice at all. On its face, I can see no reason why, in such circumstances, the court should exercise its discretion to strike out the claim form, and every reason in justice for it not to do so. It was, by common understanding, an error which caused no detriment to anybody.

23. However, Mr Grace had a further argument why the court does not have such a discretion. The argument runs in this way. For the court to disregard the error in the claim form as an irregularity, causing no prejudice, in respect of which the court could therefore grant relief under its general powers under rule 3.10, would be tantamount to treating the claim form as though it referred to an accident at work, rather than to abuse at work. Were an application to be made by the claimant to make such an amendment (as the claimant in response to this application went on to do) such an application would, in his submission, be bound to fail by reason of the provisions of rule 17.4. Therefore, if the court could not cure the mismatch by granting an amendment under rule 17.4, it would be wrong to deal with the matter by simply refusing the application to strike out under rule 3.4.

24. That argument brings me directly to the question of whether an application to amend the claim form would necessarily fail under rule 17.4. It would be most unfortunate if that were the case in circumstances where, as mentioned, it is common ground that the alteration could have been made immediately before the service and nobody has been misled by it. But if the rules on their proper construction preclude such an amendment being allowed, then the rules must be applied. In applying rule 17.4 in these circumstances, Mr Grace submits that the court should concentrate, purely and simply, on the claim form, which is the foundation document on which the proceedings depend. So viewed, it is self-evident, he submits, that to change the claim form, so as to alter the word “abuse” to “an accident”, is to substitute a new cause of action. The matter has to be viewed objectively, and the judges below were right to conclude that the rules allowed no escape for the claimant.

25. That brings me to the point raised by Jacob and Mummery LJJ in granting leave to appeal, whether that is not an over-narrow way of viewing the matter, when the claim form and particulars of claim and supporting documents were all served together. I have already made reference to the definition of the term ‘statement of case’ in the rules.”

104. I interpolate here: CPR r 2.3(1) defines ‘statement of case’ to mean ‘a claim form, particulars of claim where these are not included in a claim form, defence, Part 20 claim, or reply to defence.’

105. Going back to the judgment:

“26. In my view the just approach is to look at the totality of the documents served. These documents together set out the claimant’s pleaded case. There was an obvious mismatch, but in asking whether the proposed amendment was, in truth, an amendment to raise a new cause of action or merely to clarify an internal inconsistency in the pleaded case is, it is proper to look at the pleaded case as a whole. When one does so, it is clear, in my judgment, that what was sought

to be done by the subsequent application to amend was not, in substance, to raise any new claim at all, but merely to correct an obvious formal error. I reject the argument that an amendment to correct that clerical error was prohibited by rule 17.4 and, in my judgment, there was nothing to prevent the court from exercising its general discretion to do justice in response to the application to strike out the particulars of claim. If the circuit judge had considered that he had such a discretion, it is plain how he would have exercised it and, in my judgment, rightly so. I would therefore allow this appeal and restore the action.”

106. Arden LJ agreed with Toulson LJ and gave a short concurring judgment. She said that in resolving the issue regard had to be had to the factual matrix, which included communications between the parties’ solicitors. These made clear that at all times the defendant’s solicitors knew the claim was about injuries caused by an accident at work and not about workplace abuse. At [30] she said:

“30. As Toulson LJ has explained, there is no suggestion that the claimant deliberately referred to abuse at work in the claim form, intending to raise a claim for that. Nor is there any suggestion that the defendant understood the claimant to be doing so. So there is an obvious conflict between the claim form and the particulars of claim. They cannot both be right. In my judgment, on the ordinary rules of interpretation, the court would say that the words ‘abuse at work’ in a claim form are an obvious clerical error which can be corrected, as a matter of interpretation, to accord with their objective meaning in the context or in the light of the factual matrix -namely, accident at work. The interpretative exercise which is needed is as simple as substituting for the word “abuse” the word “accident”.

107. The principle established by *Evans*, supra, is summarised as follows in the *White Book 2021*, [17.4.4.2]:

“Amending a claim form to specify a cause of action not previously mentioned therein does not raise a new cause of action if the amendment is made simply to resolve an obvious inconsistency between the claim form and the particulars of claim served with it. In deciding whether the amendment raises a new cause of action the court should consider the proposed amendment in the context of the statements of case as a whole, not just the claim form by itself.”

108. In my judgment this case comfortably fits within this principle. Although the Claim Form was not served at the same time as the APOC, this is a distinction which does not make a difference on the facts of this case. There is an obvious inconsistency or mismatch between the Claim Form on the one hand, and the APOC, the Amended Defence and the Amended Reply on the other which is and was plain for all to see once the draft APOC had been served. All the Claimant is seeking to do is to ensure consistency between these documents in circumstances where no-one has ever been in any doubt about the scope of the Claimant’s case. What the Claimant seeks can

properly be described as ‘clerical’ or ‘tidying up’ amendments which the Defendant did not oppose in November 2020, although he does oppose them now.

109. The key part of Toulson LJ’s judgment which also covers the present case, in my respectful judgment, is this from [26]:

“In my view the just approach is to look at the totality of the documents served. These documents together set out the claimant’s pleaded case. There was an obvious mismatch, but in asking whether the proposed amendment was, in truth, an amendment to raise a new cause of action or merely to clarify an internal inconsistency in the pleaded case is, it is proper to look at the pleaded case as a whole. When one does so, it is clear, in my judgment, that what was sought to be done by the subsequent application to amend was not, in substance, to raise any new claim at all, but merely to correct an obvious formal error.”

110. I accept Mr Cohen’s evidence that this was a case of an inadvertent administrative oversight by the Claimant’s legal team. This can properly be described as ‘an obvious formal error’. The Claimant was not trying to gain some unfair tactical advantage by not amending the Claim Form at the same time as the APOC were served. There was no advantage to be gained. As I have said, the Defendant has always been clear what publications the Claimant is complaining about. He pleaded his Amended Defence over a year ago in respect of Publications 12 – 16. He has not suggested, nor could he, that he would be prejudiced by the amendments sought.
111. Had the Claimants’ lawyers turned their minds in late 2019 to the need to amend the Claim Form to be consistent with the draft APOC (which they should have done), then a draft Amended Claim Form would have been circulated at the same time as the draft APOC, and I have no doubt that the Defendant would have consented to the proposed amendments, just as he consented to the amendment of the POC. The Defendant has not, even now, suggested there would have been a proper basis to object had that step been taken. I accept that the oversight should have been spotted more quickly by the Claimant’s legal team but, given the absence of any prejudice, that is not a matter which carries much weight.
112. Further, having regard to the broader factual context (per Arden LJ’s approach in *Evans*, supra), it is significant that on 6 November 2020 the Defendant’s solicitors indicated that the First Amendment Application was not opposed.
113. The Defendant sought to distinguish *Evans*, supra, on the basis of Arden LJ’s judgment. With respect, I do not think that her judgment can bear the weight which the Defendant sought to put on it. She expressly agreed with Toulson LJ, whose judgment supports the Claimant’s case here for the reasons I have explained, and she also referred to the ‘obvious conflict’ in that case between the Claim Form and the POC. There is a similar obvious conflict here between the Claim Form and the APOC, to which the Defendant has consented and to which he has pleaded.
114. If I do not allow the amendments, it seems to me that there would be prejudice to the Claimant because he would be prevented from litigating his full case even though the

Defendant is ready, able and willing to meet it. If I refused the amendments, and they were not permissible new claims under CPR r 17.4 (as the Defendant argues), then I anticipate that the Defendant would apply to strike out the relevant parts of the APOC and Amended Reply under CPR r 3.4(2) on the grounds of irrelevance. It would no doubt be said that those parts of the statements of case were now redundant because they refer to publications not included on the Claim Form. Such an application would likely have to be allowed. But that would be an absurd result in all the circumstances of the case including, in particular, the Defendant's various consents at earlier stages of the litigation and the absence of any prejudice to him. It would be, to quote Laws LJ in *Evans*, [35], a 'stark surrender of substance to form', and would be inconsistent with the overriding objective of doing justice.

115. For these reasons, pursuant to CPR r 17.1(2)(b) and CPR r 3.10, I allow the application to amend the Claim Form to add Publications 12 to 16 to the pleaded claim for libel.
116. This conclusion makes it unnecessary for me to decide the other arguments advanced by the Claimant, but I will do so in case I am wrong, and the amendments sought are not caught by the *Evans* principle.
117. I thus turn to the question whether amending the Claim Form to add Publications 12 – 16 would involve 'new claims', and if so whether they arise out the same or substantially the same facts that are already in issue between the parties.
118. I accept the Defendant's submission that each of Publications 12 – 16 represents a new claim within the meaning of s 35(2) of the LA 1980 because each publication gave rise to a new cause of action. It is a well-established rule in defamation that the cause of action arises upon publication of the words complained of. In *Hebditch v Macllwaine* [1894] 2 QB 54, 58, Lord Esher MR said:

“It must be borne in mind that the material part of the cause of action in libel is not the writing, but the publication of the libel ...
“

Davey LJ said at p64

“It is not the writing of a libel which is actionable, but the publication of it.”

See also *Alsaifi v Npower Limited* [2020] EWHC 840 (QB), [13]; *Gatley*, supra, (12th ed.), [19.13]; *Duncan and Neill*, supra, [24.01].

119. In *Komarek*, supra, [57], the Claimants applied to amend their statements of case to allege further publication of words already complained about, by others, to others. At [58], Eady J said:

“It is clear that, in these respects, the clients are seeking to add new causes of action very close to the trial date ...”
120. The question in the present case, therefore, is whether the new causes of action arise out of the same facts or substantially the same facts as are already in issue on a claim

in respect of which the Claimant has already claimed a remedy in the proceedings: CPR r 17.4(2), as interpreted in *Goode*, supra; and see *Wood v Chief Constable of West Midlands Police* [2004] EWCA Civ 1638, [77].

121. Obviously, this question requires a fact-specific enquiry. In *Komarek*, supra, the claimants sought to amend outside the limitation period to add a claim in respect of further publications of the very same words as had been pleaded by the claimants in the action. The further publications were to Sir Jeremy McKenzie, and republications by him. The judge refused permission. He pointed out at [62]:

“In one sense, the facts sought to be relied upon in the proposed amendments are similar to those already pleaded; that is to say, the allegations about the claimants are similar. The essence of a claim in libel, however, is not the nature of the allegations but their publication. Each publication gives rise to a different cause of action. The publication to Sir Jeremy cannot, therefore, be characterised as (even ‘substantially’) the same fact as the publication to the Ambassador. ... the litigation of the factual issues relating to the 20 May publication does not mean that the issues relating to the alleged later publications to and by Sir Jeremy are bound to be litigated in any event.”

122. Eady J concluded at [65] that since the new causes of action did not arise out of the same or substantially the same facts as were already in issue, he had no power or discretion to permit the amendments.
123. In *Meadows Care Limited v Lambert* [2014] EWHC 1226 (QB), [10], Bean J said that Eady J’s judgment stood for the proposition that:

“ ... a different publishee involves a new cause of action even if the allegedly defamatory remarks are substantially the same on each occasion.”

124. *Komarek* was cited with approval by Warby J in *Economou*, supra. In that case the claimant, Mr Economou, sued the defendant, Mr de Freitas, for libel. Mr de Freitas’ late daughter, Eleanor, accused Mr Economou of rape after they had had a brief relationship. Mr Economou was arrested but not prosecuted. He then began a private prosecution of Ms de Freitas for perverting the course of justice by making a false rape allegation. The prosecution was taken over and continued by the CPS. Shortly before the trial Ms de Freitas, who had a history of mental health problems, tragically killed herself. The case was much reported. The claim for libel involved publications in the media which the claimant said contained libels for which the defendant bore responsibility to the effect that the claimant had prosecuted Ms de Freitas for perverting the course of justice on a false basis, and was guilty of her rape.
125. The claimant sought to add a new claim in respect of a publication arising out of a draft Statement supplied to a newspaper journalist, Ms Laville, on behalf of the defendant, for which the limitation period had expired. Warby J refused the amendment. He said at [49]:

“49. The meanings attributed to the draft Statement are very similar to those which are attributed to publications of which the claimant already complains, but that is not enough to satisfy s 35(5)(b) or CPR 17.4(2). The new claim ‘arises out of’ the communication of the draft Statement to Ms Laville. There is no extant claim that arises out of that communication. The claimant’s present case in respect of the first Guardian article is that it resulted from an ‘interview’.

50. ... It remains the case that the proposed ‘new claim’ in paragraphs 9A to 9D arises from facts which are not the same, or substantially the same, as ‘a claim in respect of which the party applying for permission has already claimed a remedy’ within CPR 17.4(2).”

126. Interestingly, he went on to say at [51]:

“51. The communication of the draft Statement to Ms Laville is, as the Defence stands before amendment, something positively averred by the defendant. So the question of whether the facts relied on for the new claim are the same or substantially the same as ‘are already in issue on any claim previously made’ within the meaning of s 35(5)(a) might have been a subtler one. But the discretion available to me is defined and confined by the wording of the CPR. It follows that I have none.”

127. It would therefore appear that he applied in CPR r 17.4(2) as drafted, and that he was not referred to the decisions of the Court of Appeal in *Goode*, supra, and *Wood*, supra, or that of Jackson J in *Charles Church Developments Ltd*, supra, and other cases, in which the rule has been read down (or ‘expanded’, to adopt Jackson J’s term) in the way set out earlier.

128. In *Lokhova v Longmuir* [2017] EMLR 7, in contrast, Warby J was referred to the relevant cases and held at [47] that the expanded version of CPR r 17.4(2) was to be applied. At [48] he rejected a suggestion that the decision in *Goode*, supra, was to be confined to its own facts, and said that the first question was whether the proposed amendments fell within CPR r 17(4)(2) as so interpreted.

129. Recently, in *Martlet Home Limited v Mullaley & Co Limited* [2021] EWHC 296 (TCC), [36]-[42], Pepperall J observed that in both *Akers v Samba Financial Group* [2019] 4 WLR 54, [24], and *Libyan Investment Authority v. King* [2020] EWCA Civ 1690, [38]-[39], the Court of Appeal had confirmed that it was bound by the expanded construction of CPR r 17(4)(2) first set out in *Goode*, supra. He also said at [36]:

“If, in assessing whether the new claim arises out of the same or substantially the same facts as an existing claim, the court is limited to consideration of the matters pleaded in the original Particulars of Claim then I would be satisfied that ... this application would have to be dismissed ... The cases demonstrate, however, that the court must take a wider view of

the facts arising on the claim that also encompasses consideration of the Defence.”

130. In *Lokhova*, supra, [49], Warby J explained that in assessing whether to grant an application made under CPR r 17(4)(2):

“... the court will inevitably need to assess what factual issues would, or would be likely to, arise if the amendment were allowed, and whether and to what extent those same matters are already in issue on an existing claim. In a defamation claim it is not enough that the new claims involve defamatory allegations the same as or similar to those already complained of; a broader assessment is required of what is and will be in issue.”

131. In my judgment it is clear that when CPR r 17.4(2) is read in its expanded form (as I must read it), the new claims represented by Publications 12 – 16 fall within it. In fact, they do so even reading CPR r 17(4)(2) as drafted. Those publications were put in issue by the Claimant in his APOC and so, *ipso facto*, they arise out of the same facts as the Claimant’s claim as set out in that statement of case for which he has claimed damages. They were equally put in issue by the Defendant when he pleaded to them in his Amended Defence.

132. The matter then becomes one of discretion whether to allow the amendments. Just because the amendments meet the threshold test in CPR r 17(4)(2) does not mean they have to be allowed: *Lokhova*, supra, [50]. Although there are plenty of cases to the effect that amendments ought to be allowed provided that any prejudice to the other party caused by the amendment can be compensated for in costs, and the public interest in the administration of justice is not significantly harmed (see eg, *Cobbold v London Borough of Greenwich* [1999] EWCA Civ 2074, p5; *Hewson v Times Newspapers Limited* [2019] EWHC 1000 (QB), [15]); *Salt Ship*, supra), in *Lokhova*, Warby J took a more nuanced approach (at [50] et seq). He noted at [52] that the effect of such amendments are not like others; in most such cases, the effect of such an amendment will be to deprive the defendant of an accrued limitation defence, which raises special considerations. He applied the decision in *Wood*, supra, [84], where May LJ held that, in a case where permission to amend outside the limitation period was sought, and the threshold condition laid down by CPR 17.4(2) was met:

“... the factors bearing on the exercise of the discretion ... are substantially encompassed in the terms of s 32A. The judge had to decide whether it was equitable in all the circumstances... to permit this late amendment outside what would otherwise be the statutory limitation period.”

133. Section 32A(1) of the LA 1980 allows the court to disapply the limitation period under s 4A:

“If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which –

(a) the operation of section 4A of this Act prejudices the plaintiff
..., and

(b) any decision of the court under this subsection would prejudice the Defendant ...”

134. When addressing these questions the court is required by s 32A(2) to have regard to all the circumstances of the case, and to three matters in particular:

“(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the end of the period mentioned in section 4A –

(i) the date on which any such facts did become known to him, and

(ii) the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action; and

(c) the extent to which, having regard to the delay, relevant evidence is likely –

(i) to be unavailable, or

(ii) to be less cogent than if the action had been brought within the period mentioned in s 4A.”

135. I bear well in mind that, in general, the court should be hesitant before exercising its disapplication discretion under s 32A. In *Bewry v Reed Elsevier UK Ltd* [2015] 1 WLR 2565, [5]-[8], the Court of Appeal said in a passage recently applied by Steyn J in *Alsaifi*, supra, [23]:

“5. The discretion to disapply is a wide one, and is largely unfettered: see *Steedman v British Broadcasting Corpn* [2002] EMLR 318, para 15. However it is clear that special considerations apply to libel actions which are relevant to the exercise of this discretion. In particular, the purpose of a libel action is vindication of a claimant's reputation. A claimant who wishes to achieve this end by swift remedial action will want his action to be heard as soon as possible. Such claims ought therefore to be pursued with vigour, especially in view of the ephemeral nature of most media publications. These considerations have led to the uniquely short limitation period of one year which applies to such claims and explain why the disapplication of the limitation period in libel actions is often described as exceptional.

6. *Steedman v British Broadcasting Corpn* was the first case in which the Court of Appeal had to consider the manner in which a judge exercised his discretion pursuant to section 32A of the Limitation Act 1980. Brooke LJ said, at para 41:

‘it would be quite wrong to read into section 32A words that are not there. However, the very strong policy considerations underlying modern defamation practice, which are now powerfully underlined by the terms of the new Pre-action Protocol for Defamation, tend to influence an interpretation of section 32A which entitles the court to take into account all the considerations set out in this judgment when it has regard to all the circumstances of the case ...’

7. The Pre-action Protocol for Defamation says now, as it said then, at para 1.4, that:

‘There are important features which distinguish defamation claims from other areas of civil litigation ... In particular, time is always ‘of the essence’ in defamation claims; the limitation period is (uniquely) only one year and almost invariably, a claimant will be seeking an immediate correction and/or apology as part of the process of restoring his/her reputation: see Civil Procedure 2014, vol 1, para C6–001.’

8. The onus is on the claimant to make out a case for disapplication: per Hale LJ in *Steedman v British Broadcasting Corpn* [2002] EMLR 318, para 33. Unexplained or inadequately explained delay deprives the Court of the material it needs to determine the reasons for the delay and to arrive at a conclusion that is fair to both sides in the litigation. A claimant who does not ‘get on with it’ and provides vague and unsatisfactory evidence to explain his or her delay, or ‘place[s] as little information before the court when inviting a section 32A discretion to be exercised in their favour ... should not be surprised if the court is unwilling to find that it is equitable to grant them their request’, per Brooke LJ in *Steedman v British Broadcasting Corpn*, para 45.”

136. In the unusual circumstances of this case, applying these criteria, I exercise my discretion in favour of allowing the amendments sought.
137. The starting point is that (a) no one suggests the new causes of action are not reasonably arguable; (b) what is sought are merely tidying up amendments to add claims which the Defendant has been aware of since late 2019 and consented to litigation in December 2019 when he agreed to the APOC; (c) the Defendant did not oppose the amendment of the Claim Form in November 2020. The policy underpinning the exception in s 35(3) and CPR r 17.4(2) for allowing expired claims, namely that the party against whom the proposed amendment is directed will not be prejudiced because that party will, for the purposes of the pre-existing matters, already

have had to investigate the same or substantially the same facts (see *Lokhova*, supra, [48]; *Mercer Limited v Ballinger* [2014] 1 WLR 3597, [34]) therefore applies here with particular force.

138. As I noted earlier, the Defendant does not suggest he would be prejudiced by the amendments sought, and in fact the only point made against allowing the amendment is supposed delay by the Claimant in making this application (Closing Submission, [13]). That brings me to the criteria in s 32A(2), the first of which is delay. I set out the history earlier. In my judgment, given that the application was made in July 2020 and adjourned until November 2020 at the instigation of the Defendant because of applications that he did not, in the event, pursue, it does not really lie in his mouth to complain about delay. As I said earlier, the Claimant's legal team should have spotted their error earlier, as already indicated but given the absence of any prejudice this is a minor matter. Section 32A(2)(b) does not apply in this case, and as I have said, per s 35A(2)(c), this is not a case where evidence has been lost or the Defendant prejudiced.
139. In relation to the Claimant's third argument, if I am required to decide it, then pursuant to s 32A, for the reasons given earlier, it would be equitable to disapply the limitation period in s 4A and so I direct that it shall not apply to the causes of action arising out of Publications 12 – 16. There is no prejudice to the Defendant in making such an order, and it ensures consistency between the Claim Form and the APOC. I note the Defendant's reliance on Laws LJ's judgment in *Otuo v Brierley* [2016] EMLR 6 in which he doubted whether s 32A enabled a court to allow a new claim which is arguably out of time to be added by amendment. However, I also note what Kitchin LJ said in [37] of his judgment in the same case, where he held the contrary view to be strongly arguable. In *Wood*, supra, the Court of Appeal did not doubt that s 32A could be applied in such circumstances, and I consider this approach to be binding upon me.

The Claimant's strike-out applications and the Defendant's application to re-amend the Amended Defence

140. I now turn to:
- a. The Claimant's application to strike-out:
 - (i) Parts of the Defendant's draft Re-Amended Defence, Appendix C. As I said earlier, there is an Agreed Table setting out the passages in dispute and the parties' submissions in relation to them. The application is brought under CPR r 3.4(2)(a) and/or r 3.4(2)(b) (Closing Submissions, [9]).
 - (ii) Parts of the Defendant's Third Witness Statement of 12 February 2021, Appendix B
 - b. The Defendant's application to re-amend his draft Re-Amended Defence.
141. In practical terms, the Claimant's strike-out application in relation to the draft Re-Amended Defence and the Defendant's application to re-amend it run together.

(i) Introduction

142. The Defendant's draft Re-Amended Defence (Appendix C):
- a. Maintains that the publications did not cause the Claimant serious harm;
 - b. Deletes the defence of abuse of process;
 - c. Deletes the defence of truth;
 - d. Deletes the public interest defence;
 - e. Maintains the denial that the Claimant has suffered distress or embarrassment because of the Defendant's publications and denies he is entitled to any remedy.
143. Obviously, the Claimant does not object to (b), (c) or (d). The battleground relates to other parts of Appendix C.
144. In fairness to the Defendant, I should set out [7] and [9] of his Third Witness Statement about his reasons for abandoning these defences, and his position overall:

“7. For the avoidance of doubt, my belief in the strength of my defence (in the form set out in my Amended Defence served on 18 March 2020) has not changed throughout the litigation. I would, if I could afford it, continue to maintain my defences to the claim, but for the reasons detailed below, I cannot.

...

9. ... I have ... decided to defend the claim to the limited extent of requiring the Claimant to establish liability and his entitlement to the remedies he seeks but I have confirmed that I will not rely on my substantive defences, which I have agreed can be struck out from my Defence.”

145. Paragraph 1.1 of CPR PD3A states that CPR r 1.4(2)(c) includes as an example of active case management the summary disposal of issues which do not need full investigation at trial. One power given to the court is the power to strike out a statement of case: CPR 3APD, [1.2]. CPR r 3.4 states:

“Power to strike out a statement of case

3.4

(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.

(2) The court may strike-out a statement of case if it appears to the court –

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order.

(3) When the court strikes out a statement of case it may make any consequential order it considers appropriate.

...

(6) If the court strikes out a claimant’s statement of case and it considers that the claim is totally without merit –

(a) the court’s order must record that fact; and

(b) the court must at the same time consider whether it is appropriate to make a civil restraint order.”

146. In relation to evidence, CPR r 32.1 states:

“Power of court to control evidence

32.1 (1) The court may control the evidence by giving directions as to –

(a) the issues on which it requires evidence;

(b) the nature of the evidence which it requires to decide those issues; and

(c) the way in which the evidence is to be placed before the court.

(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.

(3) The court may limit cross-examination.”

147. There are good reasons to resolve disputes about evidence prior to trial. In *Bates v Post Office Limited* [2018] EWHC 2698, an interlocutory application to strike out large parts of the claimant’s witness statement, Fraser J said at [9]:

“Extensive time at the trial, both in my judgment and applying normal sensible case management measures, should not be spent arguing about what evidence should be admitted at that very trial.... Given the breadth of the application, and the length of time (even prior to the challenged evidence being served) that the parties had been arguing about it, it seemed to me that the application should be dealt with in advance of the trial. These

were not isolated passages that were being attacked. The parties also needed to know in advance of the trial, particularly given the root and branch attack by the defendant upon such substantial amounts of the claimants' evidence.”

148. All that said, I bear in mind, as Ms Evans rightly submitted, this being a strike-out application, that where the facts are in dispute on the pleadings, I must act at the strike-out stage on the assumption that the facts are correctly stated in the pleading which is being attacked. She also said that I should not strike out on the grounds of ‘no reasonable case’ unless I am certain that the Defendant’s case is bound to fail. Further, she pointed out that it is well-established that it is not appropriate to strike-out a statement of case (or part of it) in an area of developing jurisprudence, since decisions based on novel or difficult points of law should be based on findings of fact, and I was not being asked to make findings of fact. None of these propositions is controversial.

(ii) *The rule in Dingle*

149. Some of the Claimant’s objections to the Defendant’s proposed draft Re-Amended Defence to parts of his Third Witness Statement are based on the rule in *Dingle v Associated Newspapers Limited* [1964] AC 371. It is convenient here to explain what that is.
150. The *Daily Mail* had published an article referring to a Parliamentary committee report which defamed the plaintiff but was covered by privilege. Other newspapers published the report also. The *Daily Mail* later published a similar article which was not privileged on which the plaintiff sued. The newspaper argued that damages should be reduced because of the first, privileged article, which had harmed the plaintiff’s reputation. The judge accepted this submission, but his decision was overturned on appeal to the House of Lords on the basis of what has become known as the rule in *Dingle*.
151. In *Lachaux v Independent Print Limited* [2016] QB 402, [15(9)], Warby J gave the following general description of the rule:

“In the class of case - of which the present is an example - where many have published words to the same or similar effect, it is not legitimate for a defendant to seek to reduce damages by proving the publications of the defendant or others, and inviting an inference that those other publications have injured the claimant’s reputation.”

152. *Lachaux* was a case about the ‘serious harm’ test in s 1 of the DA 2013 and whether the particular articles sued upon had caused the claimant Mr Lachaux such harm. At [69] the judge recorded the defendants’ submission that serious harm to the claimant’s reputation had neither been, nor was likely to be, caused by the publications complained of, and in support they relied on other publications containing allegations to the same or similar effect as the ones on which he had sued. They said a number of these publications had a greater print and/or online readership and/or prominence than the articles he had sued on. The judge said at [70] that the defendants’ material

showed that some of the other publications had taken place earlier than those Mr Lachaux complained of. Hence, so the argument went, the existence of these other past (and likely future) publications of similar effect to that complained of was relevant and admissible in determining the question of serious harm: if other publications had already carried or would carry the allegations, the less likely it was that the publications complained of could be said to have caused the claimant serious harm, or were likely to do so.

153. At [71] the judge said that the objection which had ‘inevitably’ been raised on behalf of the claimant was that the defendants’ reliance on this other material violated the rule in *Dingle*. The claimant’s argument was that that rule applies equally to the serious harm assessment for the purposes of s 1 as it does to the mitigation of damages (the context in which the rule was originally formulated), so that evidence of prior publication of the words complained of, whether by the defendants or unrelated third parties, is inadmissible.

154. The judge said at [74]:

“74. The decision in *Dingle* has not commanded universal agreement. To some it seems no more than common sense that previous publications to the same or similar effect are relevant when assessing what damage to reputation has been caused by a given publication. The ratio of the decision is, however, not that it is irrelevant to consider the state of a person’s reputation at the time the words complained of are published. The common law has always recognised that a person should only be compensated for injury to the reputation they actually possess. A defendant may prove in mitigation that a person has a bad reputation in the relevant sector of his life. The common law has however developed rules as to the *means* by which such a matter may be proved or, put another way, the evidence which is admissible to establish it. Previous publications to the same effect are inadmissible. The court will admit evidence from individuals who can speak of how a person is or is not esteemed, in the relevant sector of his reputation, or evidence of a conviction or possibly some other single notorious event. *Dingle* is in my judgment properly understood as a reaffirmation of those long-established rules of common law, and the policy considerations that underlie them.”

155. At [75]-[81] he set out the genesis of the rule, as follows:

“75. The speech of Lord Denning perhaps reflects this most clearly. Giving his reasons for concluding that Pearson J had erred he identified the issue in this way [1964] AC 371, 410:

‘Now comes the difficult point which I may state in this way. The *Daily Mail* are only responsible for the damage done to the plaintiff’s reputation by the circulation of the libel in their own newspaper. They are not responsible for

the damage done to the plaintiff's reputation by the report of the select committee or by the publication of extracts from it in other newspapers. If the judge isolated the damage for which the *Daily Mail* were responsible from the damage for which they were not responsible, he would have been quite right, see *Harrison v Pearce* (1858) 1 F & F 567. But it is said that he did not isolate the damage. He reduced the damages because the plaintiff's reputation had already been tarnished by reason of the publication of the report of the select committee and of the privileged extracts from it in the *Daily Mail* and other newspapers. I think he did do this and I think he was wrong in so doing.'

76. Lord Denning gave these reasons for that conclusion at pp410–411:

'At one time in our law it was permissible for a defendant to prove, in mitigation of damages, that, previously to his publication, there were reports and rumours in circulation to the same effect as the libel. That has long since ceased to be allowed, and for a good reason ... It does a newspaper no good to say that other newspapers did the same. They must answer for the effect of their own circulation without reference to the damage done by others. They may not even refer to other newspapers in mitigation of damages. Such has been the law ever since 1829 (*Saunders v Mills* (1829) 6 Bing 213; 3 Moo & P, 520), and it cannot be called in question now. It is but a particular instance of the general rule which excludes rumours or reports to the same effect as the libel, see *Scott v Sampson* (1882) 8 QBD 491, 503, 504; *Plato Films Ltd v Speidel* [1961] AC 1090, 1136: and it has been implicitly recognised by the legislature in the statutes of 1888 and 1952 which have created some limited exceptions to it, not in question here.'

77. Lord Denning addressed the contention that the claimant's reputation had been 'tarnished' by other publications. In the process he identified the kinds of evidence that the common law accepts as admissible on the issue of bad reputation, at p412:

'In order to get round this law about reports and rumours, Mr Faulks said that they had got to the stage here where Mr Dingle's current reputation was tarnished: and that evidence of tarnished reputation was admissible in evidence. But how are you to distinguish between reports and rumours which are inadmissible and tarnished reputation which is admitted? Only in this way: In order to show that a man has a bad reputation, you should call those who know him and have had dealings with him. They are in a position to judge his worth. If they consider he has a bad reputation,

they are very likely right, and he has nothing much to lose. If it is a settled reputation which has been accumulated over a period by a sequence of misdeeds, they will know of it. If it is a reputation which has been destroyed at one blow by a single conviction, they will know of it too. Either way, if you call those who know him well, you are likely to get at the truth.”

78. The other principal speech on this issue was that of Lord Radcliffe, with whom Lord Morton of Henryton and Lord Cohen agreed. He said, at p396:

‘Whatever may be the qualifications or requirements as to evidence led on the issue of reputation by way of mitigation of damages for libel, I do not believe that it has ever yet been regarded as permissible to base such evidence on statements made by other persons about the same incident or subject as is embraced by the libel itself. In my opinion it would be directly contrary to principle to allow such an introduction.’

79. Lord Radcliffe identified the principles:

‘A libel action is fundamentally an action to vindicate a man’s reputation on some point as to which he has been falsely defamed, and the damages awarded have to be regarded as the demonstrative mark of that vindication. If they could be whittled away by a defendant calling attention to the fact that other people had already been saying the same thing as he had said, and pleading that for this reason alone the plaintiff had the less reputation to lose, the libelled man would never get his full vindication.’

80. Dealing with the ‘tarnished reputation’ point, Lord Radcliffe said:

‘It is, I think, a well understood rule of law that a defendant who has not justified his defamatory statements cannot mitigate the damages for which he is liable by producing evidence of other publications to the same effect as his; and it seems to me that it would involve an impossible conflict between this rule and the suggested proof of tarnished reputation to admit into consideration other contemporary publications about the same incident. A defamed man would only qualify for his full damages if he managed to sue the first defamer who set the ball rolling: and that, I think, is not and ought not to be the law. I believe that in saying this I am doing no more than recognising the rule derived from *Saunders v Mills*. This case was decided in

1829 and it has enjoyed a long and respected reign in the textbooks on libel.’

81. Lord Radcliffe left open the possibility of proving bad reputation by means other than what he called ‘the reception of such hazy generalities as a ‘well-known pickpocket’ or a ‘notorious prostitute’’. He was not persuaded that the House’s recent decision in *Plato Films Ltd v Speidel* [1961] AC 1090 resolved the issue. But he said [1964] AC 371, 399:

‘I do not think it necessary to say anything on that point because, whatever this recent decision must be taken as laying down, I am confident that none of the members of the House contemplated that the evidence of reputation that they were speaking of could possibly embrace evidence of the use of repetition of the same defamatory words by other persons dealing contemporaneously with the same incident or subject. When one speaks of a plaintiff’s ‘actual’ reputation or ‘current’ reputation (to quote my own adjective) one means his reputation as accumulated from one source or another over the period of time that precedes the occasion of the libel that is in suit.’”

156. Not quoted by Warby J, but also worth noting, is what Lord Denning also said in *Dingle* at p412:

“Nor can the report of a particular incident, even if it be notorious, be brought up against the plaintiff. If it refers to the same matter as the libel, it tends to prove a justification and is therefore not admissible in mitigation of damages but only in support of a plea of justification. If it refers to something different from the libel, it cannot be admitted because it is specific misconduct which it is not considered fair that you should bring up against him, see *Speidel v. Plato Films Limited*.”

157. Warby J agreed with the claimant’s submission that other publications were not admissible on the question of serious harm. He said at [83]-[87]:

“83. The ratio of *Dingle* is binding on me, and it was not suggested otherwise. I have identified its ratio above. It would in my view be quite wrong for me to distinguish the decision by taking the narrow view of its ratio that Mr Price suggests [viz, that the decision simply relates to what material is admissible in mitigation of damages, and is not authoritative in the new legal environment in which a claimant must establish serious harm to reputation: see at [73]]. There is no principled distinction to be drawn between the admission of other articles in mitigation of damages, as was attempted unsuccessfully in *Dingle* in a legal

environment where damage was presumed, and the attempt to introduce such articles to reduce or limit damages in the present case, in the changed environment following the 2013 Act.

84. I would add that I am far from persuaded that there is anything fundamentally wrong with the rule in *Dingle*. The reasoning of Lord Radcliffe and Lord Denning is persuasive, not only at the level of authority but also in terms of both principle and pragmatism. The argument at this trial has underlined some of the practical problems which would be liable to flow from the approach that is urged on me by the defendants. Somewhat perversely, publishers, ordinarily straining to scoop one another with a news story, would have the opposite incentive when it came to responsibility for damage to reputation. There would be a contest not to be found to be first. And it is of course not just a question of timing. One would have to consider the extent of any overlap between readerships. Mr Price's core submission would require some assessment of the overlap between the readership of A and B. There is no evidence on that issue in this case, and I see no reason to assume that there is any substantial overlap between the readership of the various publications at issue.

85. It seems to me that the principled justifications for adhering to the rule in *Dingle* are at least as strong as they were at the time it was decided. I have cited the principles identified by the House of Lords. Another, pointed out by Devlin LJ in the Court of Appeal [1961] 2 QB 162, 189–190, is that the rule corresponds with basic principles of causation:

‘If a man reads four newspapers at breakfast and reads substantially the same libel in each, liability does not depend on which paper he opens first. Perhaps one newspaper influences him more than another, but unless he can say he disregarded one altogether, then each is a substantial cause of the damage done to the plaintiff in his eyes.’

86. Secondly, at common law, a publication which bears a meaning defamatory of the claimant is irrebuttably presumed to have caused the claimant damage, if the claimant chooses to sue on it. It could be argued that the same approach should in logic and fairness be adopted by the common law when considering the impact, if any, of other published statements to the same or similar effect: the court should presume or at least infer that a statement having a defamatory tendency has in fact caused the harm which it is inherently liable to cause. Otherwise, the scales are set unevenly as between the parties. If I am right in my construction of section 1(1) of the 2013 Act, there is now no irrebuttable presumption of serious harm to reputation; it must be proved. Although it may sometimes be proved by inference,

evidence of actual harm in the form of adverse social media responses, name-calling, or similar events is admissible, and may be necessary. In this new legal context, adherence to the limits set by *Dingle* on evidence of collateral harm to reputation may be more likely to hold the scales evenly between the parties than it did in the past. There is less room for complaint by defendants. There would be some room for complaint by claimants if defendants were now permitted to put in evidence other defamatory publications and, without more, invite an inference that these had caused serious harm to reputation. The position of a defendant would approximate to that of a claimant under the previous law.”

158. On appeal to the Supreme Court ([2020] AC 612), Warby J’s application of the *Dingle* rule was criticised by the defendant publications but upheld by the Court. Lord Sumption, with whom the other justices agreed, said:

“21. On the footing that (as I would hold) Mr Lachaux must demonstrate as a fact that the harm caused by the publications complained of was serious, Warby J held that it was. He heard evidence from Mr Lachaux himself and three other witnesses of fact, and received written evidence from his solicitor. He also received agreed figures, some of them estimates, of the print runs and estimated readership of the publications complained of and the user numbers for online publications. He based his finding of serious harm on (i) the scale of the publications; (ii) the fact that the statements complained of had come to the attention of at least one identifiable person in the United Kingdom who knew Mr Lachaux and (iii) that they were likely to have come to the attention of others who either knew him or would come to know him in future; and (iv) the gravity of the statements themselves, according to the meaning attributed to them by Sir David Eady. Mr Lachaux would have been entitled to produce evidence from those who had read the statements about its impact on them. But I do not accept, any more than the judge did, that his case must necessarily fail for want of such evidence. The judge’s finding was based on a combination of the meaning of the words, the situation of Mr Lachaux, the circumstances of publication and the inherent probabilities. There is no reason why inferences of fact as to the seriousness of the harm done to Mr Lachaux’s reputation should not be drawn from considerations of this kind. Warby J’s task was to evaluate the material before him, and arrive at a conclusion on an issue on which precision will rarely be possible. A concurrent assessment of the facts was made by the Court of Appeal. Findings of this kind would only rarely be disturbed by this court, in the absence of some error of principle potentially critical to the outcome.

22. It was submitted on behalf of the defendant newspapers that there were errors of principle in the judge’s treatment of the facts.

It was said that the injury to Mr Lachaux's reputation was at least in part the result of artificial legal rules, notably the 'repetition rule' which treats as defamatory the reporting, even without endorsement, of another person's statement; and the *Dingle* rule (see *Associated Newspapers Ltd v Dingle* [1964] AC 371) that a defendant cannot rely in mitigation of damages on the fact that similar defamatory statements have been published about the same claimant by other persons. The argument was that while these rules of law are well established, they do not affect the factual inquiry required by section 1, namely whether the harm caused by a particular publication was serious. It was also said that the judge should not have taken account of the damage that Mr Lachaux's reputation might suffer in the eyes of people who might get to know him in future. Warby J must have rejected all of these submissions, and the Court of Appeal agreed with him. So do I.

159. At [23] Lord Sumption addressed the repetition rule, and then at [24] the application of the rule in *Dingle* to the question of serious harm:

"24. The effect of the *Dingle* rule is to treat evidence of damage to the claimant's reputation done by earlier publications of the same matter as legally irrelevant to the question what damage was done by the particular publication complained of. It has been criticised, but it is well established. It has the pragmatic advantage of making it unnecessary to determine which of multiple publications of substantially the same statement occurred first, something which in the case of a newspaper would often be impossible to ascertain and might differ from one reader to the next. The judge was therefore entitled to apply it."

160. It must not be thought, however, that the rule in *Dingle* means that evidence of other publications harmful to the claimant's reputation along the same lines as that complained of can *never* be relevant or admissible in relation to the question of damage.

161. In *Barron v Vines* [2016] EWHC 1226 (QB), [21(5)], [24], Warby J said:

"(5) A person who has been libelled is compensated only for injury to the reputation they actually had at the time of publication. If it is shown that the person already had a bad reputation in the relevant sector of their life, that will reduce the harm, and therefore moderate any damages. But it is not permissible to seek, in mitigation of damages, to prove specific acts of misconduct by the claimant, or rumours or reports to the effect that he has done the things alleged in the libel complained of: *Scott v Sampson* (1882) QBD 491, on which I will expand a little ...

...

24. Another exclusionary rule established by *Scott v Sampson* was a bar on reliance on rumours or reports to the same effect as the words complained of. A consequence is that, as a rule, other publications to the same effect as the libel are inadmissible in mitigation of damages: *Dingle v Associated Newspapers Ltd* [1964] AC 371 (see Lord Denning at 410-411). But the court may need to ‘isolate’ the harm caused by the publication complained of from that caused by others: see Lord Denning in *Dingle* at 397-8 explaining *Harrison v Pearce* (1858) 1 E & F 567. This is relevant in this case, not least because the claimants rely on a variety of written and oral taunts and it will be necessary to consider whether these are shown to have resulted from the Vines libel, or the Collins speech.”

162. The law in this area was conveniently summarised in *Duncan and Neill on Defamation* (5th Edn), [25.19] et seq; and see *Burstein v Times Newspapers Ltd* [2001] WLR 579, [28]-[36].
163. Thus, publications to the same effect as that sued on may be admissible, for example, where a claimant sues publication X, claiming that a particular damaging consequence occurred because of something written by publication X. It would in principle be permissible for publication X to plead and seek to prove that it was not *its* publication which caused the particular adverse event harmful to the claimant, but it was a story in a different publication to the same effect which caused the event. This is sometimes known as the ‘rule of isolation’. In *Napag Trading Limited v Gedi Gruppo Editoriale spa* [2020] EWHC 3034 (QB), Jay J made the following observations:

“51. The fourth issue of law is the extent to which the principle in *Dingle v Associated Newspapers Ltd* [1964] AC 371 obviates any enquiry into the causation of the Claimants' various losses. This is a point which arose in oral argument and was not addressed in any detail in the skeleton arguments. It attracted a wave of further authority and helpful submissions from all Counsel, Mr Eardley in particular.

52. This issue arises because the Defendants say that the claims for special damage in particular all arise out of events which pre-date the first publication in this case, which was in October 2019. So, as a matter of causation it is contended that the Claimants cannot have suffered ‘serious harm’, or (in the case of the corporate Claimants) ‘serious financial loss’ which equates to ‘serious harm’. For the purposes of this argument on causation, it in fact matters not whether the harm complained of was or may have been caused by a separate defamatory article, namely that published by the Second Defendant on 25th May 2019 or, possibly, different articles altogether. What matters is that it *cannot* have been caused by anything done by the Defendants.

53. The cases I was referred to include *Lachaux* (at first instance ([2016] QB 402) and in the Supreme Court), *Economou v de Freitas* (at first instance ([2017] EMLR 4) and in the Court of Appeal ([2019] EMLR 7)) and *Harrison v Pearce* [1858] 1 F&F 567.

54. This is not the occasion to attempt an exhaustive review of the authorities and synopsis of the relevant principles. I consider that I may be briefer.

55. *Dingle* expresses the principle that a defendant cannot rely in mitigation of damages on the fact that similar defamatory statements have been published about the same claimant by others. The case was concerned with what may be described (but I hope the term is not misunderstood) as ‘general damage to reputation’ in connection with a number of publications of substantially the same libel at more or less the same time. The legal policy behind the principle is that if a claimant had to identify which particular publication was causative or apportion the harm as between various publications each with an apparently similar causative impact he could not possibly do so.

56. However, that does not mean, as Sharp LJ explained (see para 41) in *Economou*, citing with approval paras 46-50 of the judgment of Dingemans J in *Sobrinho v Impress Publishing SA* [2016] EMLR 12, that difficult points of causation cannot arise under s 1 of the Defamation Act 2013. *Dingle* was understood to be a decision about mitigation of loss rather than causation, and I have already identified the factual structure of the case that was under consideration by the House of Lords, viz. various similar publications at more or less the same time.

57. These causation problems may arise where there are limitation or jurisdictional issues. In my judgment, in line with principle and authority, they may also arise where a claimant seeks to ascribe a specific consequence to a particular publication, or where an examination of the claim for special damage demonstrates that the harm in question could not have been caused by the publication at issue. Thus, if a claimant says that X happened because of publication Y, or if it is clear to the court that the reason X happened was because of publication Y, it is no use the claimant suing publisher Z in respect of that consequence.”

164. Put another way, *Dingle* does not abrogate the rules relating to causation in tort law. This, I respectfully suggest, was among the points recently made by Warby J in *Sicri v Associated Newspapers Ltd* [2020] EWHC 3541 (QB). This was a claim in breach of confidence and misuse of private information brought by an individual who had been identified in the MailOnline website (operated by the defendant) as having been

arrested in connection with the terrorist bombing in Manchester in May 2017. He was subsequently released without charge.

165. At trial, liability was established against the defendant in misuse of private information (it being held unnecessary to consider the breach of confidence claim). One of the issues which arose in the assessment of damages was whether the Court should, in quantifying the award against the defendant, take into account other contemporaneous publications which had reported on the claimant's arrest (and had identified him).
166. It was in this context that Warby J gave consideration to the application of *Dingle*, notwithstanding that the claim was brought in misuse of private information, not libel. At [178] he expressed the following principles applicable to both misuse of private information and libel claims:

“(1) As Mr Tomlinson [counsel for the claimant] points out, the general principle in tort law is that a defendant is liable for damage of which its wrongful conduct was a material cause. As Devlin J put it in *Heskell v Continental Express* [1950] 1 All ER 1033, 1047:

‘Where the wrong is a tort, it is clearly settled that the wrongdoer cannot excuse himself by pointing to another cause. It is enough that the tort should be a cause and it is unnecessary to evaluate competing causes and ascertain which of them is dominant.’

(2) So, if the evidence establishes some identifiable item or category of damage which is indivisible, and that the defendant's wrongful conduct was ‘a cause’, the defendant will be liable in respect of the whole of that damage. Any risk of injustice to the defendant falls to be dealt with by means of a claim for contribution against the joint tortfeasor(s) who were also responsible for the whole: *Rahman v Arearose Ltd* [2001] QB 351 [19] (Laws LJ).

(3) But this principle does not apply in a case where the evidence shows that (a) each tortfeasor caused some part of the damage, but (b) neither caused the whole, and (c) the claimant would have sustained some part (but not all) of the damage if only one of the torts had been committed, but (d) on the evidence, it is impossible to identify with any precision what part or element of the damage has been caused by which defendant. In such a case: ‘The fact-finding court's duty is to arrive at a just conclusion on the evidence as to the respective damage caused by each defendant, even if it can only do it on a broad-brush basis which then has to be translated into percentages.’ *Rahman v Arearose* [21-23] (the citation is from [23]).

(4) This is also the approach that must be adopted, in my view, to a claim for general damages for libel or misuse of private information where the evidence shows that several publishers simultaneously published the same, or similar, content and the Court is seeking to identify an appropriate figure for the overall, or general impact, of the wrong committed by one of those publishers. This is not a case of a single indivisible item or head of loss or damage caused by concurrent tortfeasors, for reasons explained by Laws J in *Rahman v Arearose*. The harm is non-material and cannot, in itself, be observed. Usually, the right inference will be that some publishers caused some damage by defaming the claimant, or wrongfully conveying his private information, to one group of readers; and other publishers caused other damage by traducing the claimant, or exposing his private information, to different or additional readers. The evidence is likely to suggest such a conclusion, but without enabling the court to be precise.

(5) But the position is different when it comes to specific items of loss, or particular events that are relied on as evidence of damage. These are subject to the general rule above: the claimant is entitled to succeed if he establishes that the defendant's wrongdoing was a cause of the item or event, but if the evidence shows that it was not, or he fails to persuade the court that it was, that aspect of the claim will fail.

(6) The rule in *Dingle* has no bearing on the above. It is a rule of evidence or case management, grounded in pragmatic considerations. Its ratio is that, whilst the defendant to a claim in defamation may prove, in mitigation, that the claimant had a pre-existing general bad reputation, this may not be done by relying on other publications to the same or similar effect: see my decision in *Lachaux* at first instance [2016] QB 402 [74]ff, and the passage cited above from the judgment of Lord Sumption when the case reached the Supreme Court. I note that Jay J has recently reached essentially the same conclusion in the libel case of *Napag Trading Ltd v Gedi Gruppo Editoriale SpA* [2020] EWHC 3034 (QB): see [51]ff esp. [55-57] and [60].

(7) Consistently with the above, the rule in *Dingle* does not relieve the Court of the duty of 'isolating' the damage caused by the defendant tortfeasor from any harm that others may have caused to the same interest of the claimant.

(8) Points (5) and (7) above often arise in conjunction in cases where the claimant has been the subject of defamation or other injurious publication by two or more persons, and proves that he was taunted or abused, or shunned or avoided, by people who formerly enjoyed his company. In such a case, the Court

must review causation to determine whether to compensate the claimant on the basis that such taunts and so forth were a consequence of the defendant's tortious behaviour: A case in point is *Barron v Vines* [2016] EWHC 1226 (QB) [24], [44-50].”

167. All of that said, it is worth reiterating for the purposes of the issues arising in this case that *Dingle* and *Lachaux* demonstrate that: (a) evidence of the claimant’s general bad reputation is admissible in relation to mitigation of damages, but such must be proved in a specific way by calling persons who know him and who have had dealings with him and who can speak to his bad reputation. Subject to exceptions, evidence of specific conduct is not admissible. Exceptions to that general prohibition include a previous conviction or possibly (per Warby J in *Lachaux* at [74]), a previous notorious incident, and ‘judicial strictures in previous civil litigation’ (*Turner v News Group Newspapers Ltd* [2006] 1 WLR 3469, [48]). Other than that, such evidence is generally only relevant to a plea of justification; (b) it is not permissible for a defendant to prove, in mitigation of damages, that, previously to his publication, there were reports and rumours in circulation to the same effect as the libel; (c) nor can a defendant rely on such publications to show that his publications could not have caused the claimant serious harm for the purposes of s 1 of the DA 2013 because other, similar, publications had already harmed him.
168. I will deal separately with the decision in *Burstein*, supra, and the admission of evidence of directly relevant background context in relation to damages, later in this judgment.

(iii) *The matters in dispute*

169. As I have said, I have been provided with a colour-coded version of Appendix C and an Agreed Table setting out the parties’ positions on the matters in dispute. It will be necessary for me to set out parts of Appendix C to aid understanding, and it contains colour coding which I also need to explain (Claimant’s Closing Submissions, [14]-[18]):

“...

a. As to the colour of the text itself (in line with CPR Practice Direction 17):

- i. **Black text** connotes text in the Original Defence;
- ii. **Red text** connotes text added in the Amended Defence;
- iii. **Green text** connotes text added as draft re-amendment. There is no application to re-amend, but the Claimant is not insisting.

As to the colours of the highlighting (agreed between the parties):

- i. **GREEN HIGHLIGHTING** is for proposed re-amendments (which are entirely deletions to existing text) to which the Claimant agrees [I interpolate here, these include the defences which the Defendant is no longer relying upon];
- ii. **PINK HIGHLIGHTING** is for existing text in the Amended Defence which the Claimant continues to pursue his strike-out application;
- iii. **BLUE HIGHLIGHTING** is for proposed re-amendments (which are either entirely new text, or newly inserted language taken from other parts of the pleading which is being abandoned by re-amendment).

15. Absent the Claimant's consent, the Court's permission is required to make the BLUE HIGHLIGHTED re-amendments.

16. The Claimant actively opposes these BLUE HIGHLIGHTED re-amendments insofar as they appear in paragraphs 1-36, for the same reasons as he persists in the strike-out of the PINK HIGHLIGHTED text.

17. The Claimant does not oppose the BLUE HIGHLIGHTED amendments to paragraphs 37 to 39 insofar as they relate only to mitigation of damages, not to 'serious harm.'

18. However, if (but only if) the PINK HIGHLIGHTED text is struck-out, the Claimant has said he will voluntarily drop his Aggravated Damages plea, as the additional damages which might accrue would not be worth the additional days of trial which would be needed to try the BLUE HIGHLIGHTED passages at paragraphs 37-39 as a response to Aggravated Damages."

170. I also have a colour coded version of the Defendant's Third Witness Statement (Appendix B). I will come to that later.
171. *Paragraph 3 of Appendix C (first three sentences)*: these relate to Calvin Ayre and contains a number of factual averments about him. The Defendant has agreed to delete all of this paragraph except for the first three sentences. These describe Mr Ayre as supporting the Claimant. In her oral submissions Ms Evans said that had truth/abuse of process still been part of the Defence then it would have been the Defendant's case that Mr Ayre and the Claimant were engaged in monetising the Claimant's claimed identity as Satoshi.
172. The Claimant submits that these sentences should be struck out because they were only relevant to the Defendant's abuse of process defence, which has now been abandoned. The Claimant accepts that Mr Ayre's name occurs elsewhere in the pleadings and evidence, but says what the Defendant wishes to retain, eg that he supports the Claimant in these proceedings, goes beyond what is relevant. The

Defendant says these sentences should be retained, in essence, to make sense of other parts of the Amended Defence where he is referred to, including as supporting the Claimant, and to which no objection is made.

173. This is a fairly *de minimis* matter, all things considered, and I decline to strike out these three sentences and I uphold the Defendant's submission. Mr Ayre is referred to in the pleadings and evidence in a number of places and is referred to in some of the publications complained of (see above), from which it is clear he supports the Claimant, and there is at least one reference elsewhere in the Amended Defence (at [8.2]) to him supporting the Claimant, which the Claimant does not object to. Retaining these sentences will aid clarity and understanding.
174. *Paragraphs [7.3], [7.4] and [7.4A]*: these relate to the Claimant's pleaded meaning of Publication 1 in [5.1] of the APOC (see above) and appear under the heading of 'Meaning'.
175. Paragraphs [7.1] and [7.2] of the Amended Defence:
- a. admit that 'Satoshi Nakamoto' is generally believed within the worldwide Bitcoin and cryptocurrency community to be the individual or group of persons who originally created Bitcoin; but
 - b. plead that whether or not it is generally believed or accepted that Satoshi is or may be one individual or a group of individuals is immaterial for the purposes of this claim.
176. The disputed paragraphs are as follows:

“7.3 This is for two reasons. First, the Claimant and others on his behalf have made repeated public statements, since at least 2015, that it is the Claimant himself who is Satoshi Nakamoto, the creator of Bitcoin. To this end, in April and May 2016 the Claimant claimed publicly and in private that he would prove that he was Satoshi Nakamoto by carrying out exercises using Satoshi's private cryptographic keys. Those exercises (“the April / May 2016 exercises”) very publicly failed, leading led to the widely held and expressed view in the Bitcoin and cryptocurrency community that the Claimant's continuing claim to be Satoshi Nakamoto was a sham (as set out in paragraphs 22.20 to 22.29 below). Second, if Satoshi Nakamoto is a group of individuals, the Claimant's claim to be Satoshi is a claim that he is an individual within the group who has control of the private cryptographic keys associated with the critical earliest blocks in the blockchain.

7.4 The facts in paragraph 7.3 above were, at the time of the publications complained of, generally known in the worldwide Bitcoin and cryptocurrency community, including by all or at least a very large majority of those who read the [ten] Tweets[, and/or viewed the video,] complained of or any of them, readers

of the Defendant's Tweets[, and viewers of the video,] being persons with a special interest in and knowledge of Bitcoin and cryptocurrency.

7.4A The Defendant will contend that, to the readers referred to in paragraph 7.4 above, by way of that innuendo plea, the words complained of meant and were understood to mean that the Claimant's claim to be Satoshi Nakamoto (the pseudonymous person or one of the group of people who created Bitcoin) was fraudulent, in that it was a lie, as demonstrated by his own failed promises to provide cryptographic proof of that claim."

177. Paragraph 7.5 goes on to aver: 'Accordingly, paragraph 5.2 is denied'.
178. Hence in effect in these paragraphs the Defendant seeks to plead that whether Satoshi is one person, or a group, is not relevant, because it is 'generally known' that whatever the case may be, the Claimant's claim to be him, or part of the group, is a 'sham', and he had failed in a promise to provide cryptographic proof.
179. The Claimant objects to these paragraphs because he says they amount to a reverse innuendo plea which is incoherent, bad in law, and/or an abuse of process and so should be struck out (pink parts) and leave to amend refused (blue parts) (Supplemental Skeleton Argument, [30]). He also says they amount to an attempt to circumvent the rule in *Dingle* because they are, in effect, a plea of rumours to the same effect as the publications complained of, which is not permitted.
180. The Defendant argues (Skeleton Argument, [51]-[52]) for the inclusion of these passages and for leave to amend first on the basis that he is contending for a different meaning to the Claimant, namely that the Claimant's claim to be Satoshi (either the one person or group who created Bitcoin) was fraudulent, in that it was a lie, as demonstrated by his own failed promises to provide cryptographic proof of that claim and that this was a commonly held belief in the relevant community.
181. In support of the plea that there is a 'widely held and expressed view in the Bitcoin and cryptocurrency community that the Claimant's continuing claim to be Satoshi Nakamoto was a sham', Ms Evans said that the Defendant proposes at trial (if permitted to do so) to rely upon a selection of material which was exhibited to his First Witness Statement (in Exs PM1 and PM2) (albeit that that witness statement has now been withdrawn) which reported on the Claimant's claim to be Satoshi; his supposed public failure to provide cryptographic proof in 2016 that he is Satoshi; and other material, eg, tweets, in which the Claimant's claim had been labelled as false or a sham. Paragraph 49 of the Defendant's Skeleton Argument explains:

"... the Defendant intends to make submissions at trial upon such of that material as is appropriate in support of the following pleaded issues (which do not "offend" *Dingle*):

- (a) innuendo meaning (specifically the particulars in ¶5 AmPoC, ¶¶7.3-7.4 ReAmDef, which are in rebuttal of the Claimant's innuendo particulars, and ¶¶6-7 AmR);

(b) causation of serious harm (¶¶25 AmPoC and ¶¶18-19 ReAmDef);

(c) rebuttal of aggravated damages, which relies in part on the Defendant's rebuttal of particulars of serious harm, in response to the Claimant's adoption of his case on serious harm in support of his aggravated damages plea (¶¶26 AmPoC and ¶¶37 ReAmDef); and

(d) mitigation of damages (general bad reputation or notoriety and *Burstein* relevant background context) (¶39 ReAmDef).

182. Ms Evans took me to a sample of this material (see Core Bundle, Part G). For example, she referred me to a 2015 article on wire.com (Vol 8, p2549) headlined:

“New Clues Suggest Craig Wright, Suspected bitcoin Creator, May Be a Hoaxer

Doubts about Wright's academic credentials and supercomputer achievements hint that he could have faked the clues identifying him as bitcoin's creator”

183. I was also shown an article from 2016 on ccn.com (Vol 9, p2570):

“Text Analysis confirms Craig Wright is not Satoshi Sakamoto”

This article went on:

“Both Gizmodo and Wired reported in December that Wright, a 44 year old Australian cryptocurrency expert, might be the pseudonymous Nakamoto. The reports set off a flurry of speculation, with many claiming Wright wasn't Nakamoto but had masterminded a hoax. Both Wired and Gizmodo acknowledged this possibility in their initial reports.”

184. Ms Evans also showed me articles in mainstream publications such as the *Financial Times*, *The Economist*, *Forbes* (‘Craig Wright Claims He's bitcoin Creator Satoshi -- Experts Fear An Epic Scam’) and *The Guardian* (‘Craig Wright's Claim to be bitcoin founder labelled a 'scam' and ‘Craig Wright U-turns on pledge to provide evidence he invented bitcoin’) to show that the story had been widely covered.

185. Ms Evans also referred me to a second category of material, namely tweets along the same lines as those sued on, in which the authors asserted that the Claimant was not Satoshi but was falsely claiming to be. Again, two examples will suffice, both posted around the same time as the Defendant's tweets:

“Craig Wright is not Satoshi.

Anymore of this sh!t, we delist !”

And:

“Craig Wright is a scammer and a fraud, @CALVINAYRE and @RealCoinGeek are using their platform to illegally threaten and risk the well-being of an individual.”

186. It seems to me that the Claimant’s submission are broadly correct, the pink highlighted text should be struck out, and the Defendant’s blue suggested amendments must be refused. That is for the following reasons.
187. In *Vardy v Rooney* [2020] EWHC 3156 (QB), [37], Warby J explained what a reverse innuendo plea is:

“37. I refer to what defamation lawyers call a reverse innuendo: a meaning less injurious than the ordinary meaning of the words, that will be conveyed to readers because of some facts they know, which go beyond matters that are common knowledge. It is clear law that a defendant who wishes to advance a case that words complained of bore such a meaning must serve a statement of case that identifies the facts that are said to have been known, and the basis for saying that readers knew them ...”

See also *James v Saunders* [2019] EWHC 3265 (QB), [25]; *Barron v Collins* [2015] EWHC 1125, [49]; *Duncan and Neill*, supra, [5.36].

188. These authorities make clear that the point of a reverse innuendo plea by a defendant is to lessen or extinguish altogether the defamatory meaning pleaded by the claimant on the basis of extrinsic facts the defendant says were known by all of the publishees.
189. It is also clear that for a reverse innuendo defence to succeed, the defendant must show that all of the publishees knew of the extrinsic facts he relies on to extinguish the otherwise defamatory meaning. If some do not, then *ipso facto* the claimant will succeed in respect of his pleaded defamatory meaning in relation to them at least. In *Gatley*, supra, [3.23], the editors state:

“Where it is the defendant who relies on extrinsic facts to show that words defamatory in their natural and ordinary meaning did not convey to those to whom they were published a defamatory meaning, he must show that all the persons to whom the words were published knew the facts, since otherwise the claimant will have been defamed to those persons who did not know the facts.”

190. In *Johnston v League Publications Limited* [2014] EWHC 874 (QB), [40], Eady J said that:

“... a defendant who can only show that some readers knew the extrinsic facts he prays in aid will, by the same token, only be able make out a partial defence of justification. It cannot avail

him in respect of any readers who were unaware of the relevant facts.”

191. Mr Wolanski’s first point is that the Defendant’s plea does not achieve this and so is bad in law because, to the extent it pleads a reverse innuendo, it results in a meaning which is at least as defamatory, if not more so, than the Claimant’s innuendo plea, because it is to the effect that the Claimant has *both* fraudulently claimed to be Satoshi *and* tried to hoodwink the crypto-community by falsely claiming he could prove it using cryptography but then failing to do so.
192. I agree. In these paragraphs the Defendant (a) admits that readers of the words complained of would have known the innuendo facts that the Claimant relies on in [5.1] of the APOC; but (b) pleads certain additional extrinsic ‘facts’ in [7.3] which the Defendant contends were generally known in the worldwide Bitcoin and cryptocurrency community, including by all or at least a very large majority of the publishers of the words complained of.
193. As I have said, in general, a Defendant will plead a reverse innuendo meaning if he wishes to contend that readers would have understood the words either in a non-defamatory sense, or in a lesser defamatory sense. But here, unusually, the Defendant seeks to rely on extrinsic facts in support of a meaning which is at least as defamatory as the meaning pleaded by the Claimant: a meaning which not only contains the same *Chase* level one sting as the Claimant’s meaning (ie, that he falsely claimed to be Satoshi), but *additionally* contains the defamatory imputation that the Claimant made failed promises to provide cryptographic proof of his fraudulent claim to be Satoshi.
194. The Claimant says that a defendant’s meaning has only two proper functions:
 - a. to support some positive defence (eg, a *Lucas-Box* meaning for the purposes of the defence of truth (*Lucas-Box v News Group Newspapers Ltd* [1986] 1 WLR 147), or a *Bonnick v Morris* meaning (the defendant’s intended meaning in support of a public interest defence) (*Bonnick v Morris* [2003] 1 AC 300)). However, the Claimant says there is no longer any positive defence in these proceedings.
 - b. to lessen the harm, and thus reduce the damages payable to the claimant, because the defamatory sting is not as serious as that pleaded by the claimant.
195. The Claimant says that given that the Defendant is no longer pursuing a defence of truth or public interest, and so is not required to plead any alternative meaning which he contends was true (eg, a *Lucas-Box* meaning, which was formerly pleaded in [21] of the Amended Defence within the defence of truth), the question arises: why has the Defendant sought by way of amendment to advance this meaning into his pleading at this late stage ? It cannot be because, if his meaning is found to be correct, this will lead to a lower award of damages, since that meaning is not a less serious meaning than the Claimant’s pleaded meaning.
196. It seems to me that the answer is, as suggested by the Claimant, because the Defendant wishes to put before the court evidence of the matters pleaded in [7.3], namely:

- a. that the Claimant ‘failed to prove that he was Satoshi’ in 2016; and
- b. that there was a ‘widely held and expressed view in the Bitcoin and cryptocurrency community that the Claimant’s continuing claim to be Satoshi was a sham’.

197. As to (a), the Claimant disputes that he did fail to prove he was Satoshi in 2016: see Amended Reply, [10.2.1] and [42.1]. The Claimant’s case is, in brief, that he is Satoshi because he invented Bitcoin in 2008, and that he was persuaded in 2016 against his will to carry out an experiment to support his claim which, in fact, succeeded. He says he gave extensive disclosure on these matters and had planned to call witnesses, including expert evidence, to support his case at a three-week trial.

198. However, it is important to recognise that the Defendant has abandoned his truth plea, and so these matters are not now going to be examined at trial. I therefore agree with the Claimant that the Defendant is, under the guise of a case on reverse innuendo meaning, seeking to resurrect matters relevant to his abandoned truth defence and that he should not be permitted to do this. If he wishes to litigate the ‘failed experiment’ he can only do so by advancing a properly particularised case which can be fully tried, but as I have said, he has abandoned that approach.

199. As to (b), the Claimant says that the Defendant is seeking to rely on reports that he is a sham who failed to provide proof he was Satoshi (ie, the pleaded ‘widely held and expressed view’). For the reasons I have set out earlier, this is not legitimate. The ‘widely held view’ is, on the facts of this case, just another way of saying there are rumours and speculation to the same effect as the Defendant’s publications, and reliance on such matters is not permitted in the way proposed by the Defendant for the reasons I have explained. As the Claimant put it in [21(a)] of his Closing Submissions:

“It is not disputed by the Claimant that there has been a significant public controversy over the years about the Claimant’s claim to be Satoshi, and that others have accused him of making false claims to that effect. However, what the Defendant is seeking to do in this case, namely rely at trial upon a vast amount of (unpleaded) material comprising publications by third parties allegedly to the same or similar effect as the words complained of, is legally impermissible.”

200. The Defendant also submits that there is no reason in principle why a defendant cannot rely on innuendo facts to support his case on meaning where the defendant is not also seeking to prove the truth of that innuendo meaning (Defendant Skeleton Argument, [59]-[60]):

“It will be particularly important that a defendant can do this now that the claimant must establish serious harm, for the defendant’s innuendo meaning may be less likely to cause serious harm than the claimant’s, because of what, by way of the defendant’s innuendo facts, the reasonable publishee will

be taken to know, and to bring to his/her interpretation of the words complained of.”

201. That may or may not be so, but not on the facts of this case where the Defendant’s pleaded innuendo meaning is unquestionably more serious. That is made clear by [103] of the Defendant’s Skeleton Argument in relation to the question of serious harm which states:

“The Defendant’s counter-case on innuendo meaning is to rely on (limited) further facts which, he will contend, were or would have been, also known to his readers, namely that (a) the Claimant had been publicly claiming since 2015 that he was Satoshi Nakamoto, and (b) that as a result of events involving the Claimant in 2016 there had been, ever since, a widely held and expressed view in the Bitcoin and cryptocurrency community that the Claimant’s continuing claim to be Satoshi Nakamoto was a sham.”

202. Suppose, I ask rhetorically, these paragraphs were allowed to stand and the Defendant adduced evidence as to what people in the Bitcoin community generally believed, and what had been reported, along the lines of the material which Ms Evans showed me. Where would that take him, given he is no longer seeking to prove that it is, in fact, true, that the Claimant has made fraudulent claims to be Satoshi? The answer, it seems to me, is nowhere. It is not a legitimate reverse innuendo plea for the reasons I have given; justification has been abandoned; and he cannot rely on such matters in mitigation of damages or in relation to serious harm because of the rule in *Dingle*. As Lord Denning said in that case at p410:

“At one time in our law it was permissible for a defendant to prove, in mitigation of damages, that, previously to his publication, there were reports and rumours in circulation to the same effect as the libel. That has long since ceased to be allowed, and for a good reason. Our English law does not love tale-bearers. If the report or rumour was true, let him justify it. If it was not true, he ought not to have repeated it or aided its circulation.”

203. If it be suggested that the material specifically relating to the Claimant’s supposed failure to prove via cryptography in 2016 that he was Satoshi qualifies as evidence of a ‘notorious’ incident (per Warby J in *Lachaux* at [74]), and is thus admissible by way of an exception to the prohibition on evidence of specific conduct relating to bad reputation, then it seems to me this is precluded by Lord Denning’s words in *Dingle*, supra, p412:

“Nor can the report of a particular incident, even if it be notorious, be brought up against the plaintiff. If it refers to the same matter as the libel, it tends to prove a justification and is therefore not admissible in mitigation of damages but only in support of a plea of justification. If it refers to something different from the libel, it cannot be admitted because it is

specific misconduct which it is not considered fair that you should bring up against him, see *Speidel v. Plato Films Ltd*”

204. I also agree that the plea must fail because the Defendant cannot prove, on the evidence, that all publishees of the words (ie, all the people who had the extrinsic knowledge pleaded by the Claimant) also had knowledge of the matters pleaded by the Defendant: see above. His evidence on the knowledge that readers had is extremely thin, amounting to no more than bare assertion by him: Defendant’s Third Witness Statement, [20]:

“Most of the readers of the first to fifteenth publications, and viewers of the sixteenth publication, were likely to be persons with a special interest in and knowledge of bitcoin and cryptocurrency because of the nature of my journalism and audience. The likelihood is that all, or the vast majority, of the readers or viewers of those publications would as a result of that interest have already seen at least some of the widespread publications alleging that the Claimant was fraudulently claiming to be Satoshi Nakamoto before any of the publications complained of were published.”

205. *Paragraph 18.8* (second and third sentences). This paragraph appears in Appendix C in the pleading under the heading ‘Serious harm’. Paragraph 25.8 of the APOC in relation to serious harm avers that:

“The inference will be invited that the readership of publications one to eleven were. in a similar manner to the readership of publications twelve to fifteen, influential Twitter users who were often active in the field directly related to the Claimant’s field of employment and area of interest. namely the cryptocurrency sphere. The Defendant will also rely, in support of this contention, on the responses to publications twelve to fifteen by other Twitter users. In particular ...”

206. The paragraph in dispute is:

“As to paragraph 25.8 it is admitted and averred that the readers of the [First to Fifteenth]Publications[, and viewers of the Sixteenth Publication,] were persons with a special interest in and knowledge of bitcoin and cryptocurrency. All, or the vast majority, of the readers or viewers of those publications would have learnt of the notorious allegation that the Claimant had fraudulently claimed to be Satoshi Nakomoto, which arose out of ~~his failed promises to prove he was Satoshi~~ the April / May 2016 exercises and which formed an intrinsic part of his reputation, from sources other than the publications complained of, as summarised in paragraphs 7.1 to 7.4 above. For example, the hashtags “#faketoshi” and “#CraigWrightIsAFraud” were extensively and routinely linked to the Claimant on Twitter by numerous users far more prominent than the Defendant. Paragraph 19 below is repeated.

The meaning of the allegation that such readers were “influential Twitter users who were often active in the field directly related to the Claimant’s field of employment and area of interest, namely the cryptocurrency sphere” is excessively vague and not admitted. [As to the sub-paragraphs to paragraph 25.8:”

207. The Claimant objects to these sentences on the straightforward basis that they offend against the rule in *Dingle* (as it applies to the pleaded case of general serious harm) and should be struck out and the permission to amend now sought should be refused. It is an attempt to plead that the Claimant cannot have suffered serious harm as a result of the Defendant’s publications because of what was believed generally, from other sources, in the identified community.
208. In his Supplementary Skeleton Argument at [28], the Claimant accepts that the Defendant would, in principle, be entitled to:
 - a. plead and prove a case on general bad reputation by calling witnesses who know the Claimant who could give such evidence;
 - b. identify specific harm caused by other publications under the Rule of Isolation;
 - c. plead other awards of damages or settlements under s 12 of the Defamation Act 1952, but only in mitigation of damages;
 - d. if found liable for publications to publishees who also read third-party publications, to bring a claim for a contribution under the Civil Liability (Contribution) Act 1978 Act.
209. He says the Defendant has done none of these things, and that the law is thus clear that the Defendant is not entitled to rely on third-party publications to publishees of his own publications (which are sued upon) to rebut the Claimant’s case on either serious harm, or as a plea to mitigate damages, and that that is the effect of the rule in *Dingle*.
210. In response, the Defendant proposes the following amendment to the passage objected to: “All, or the vast majority, of the readers or viewers of those publications would have learnt of the notorious allegation that the Claimant had fraudulently claimed to be Satoshi Nakomoto, which arose out of his ~~failed promises to prove he was Satoshi~~ the April / May 2016 exercises and which formed an intrinsic part of his reputation, from sources other than the publications complained of, as summarised in paragraphs 7.1 to 7.4 above.”
211. In my judgment the Defendant’s pleading is impermissible and I strike out the offending pink sentences and refuse the Defendant permission to amend for the text in blue.
212. Paragraph 25.8 of the APOC, to which these paragraphs were responding, forms part of the Claimant’s case on serious harm. His case, first, is that the allegations made by the Defendant were by their nature seriously damaging (see eg APOC, [25.1]). He then pleads the extent to which the publications were re-tweeted (and so, by inference,

the extent to which they were read), and then at [25.8] pleads the readership were influential Twitter users who were active in the same field as him. In the sub-paragraphs to [25.8] further particulars are then given of the (adverse) reaction to the Defendant's publications.

213. Paragraph 18.8 traverses [25.8] by saying that such readers would have known from other (unspecified) sources of the 'notorious allegation' about the Claimant, and so he could not have suffered the serious harm alleged by virtue of the content of the publications. But that is precisely what *Lachaux*, supra, says cannot be done: other adverse publications about a claimant to the same effect as the publications sued on cannot be relied upon in order to try and defeat a plea of serious harm. Moreover, on the facts of his case, the 'notorious allegation' is another way of saying 'rumour'. Contrary to how Ms Evans argued the point, this is not an attempt by the Defendant to isolate damage caused by other publications from damage caused by his publications. It is an attempt to plead that the Claimant was the subject of rumours along the same lines as that published by the Defendant, and so could not have suffered serious damage to his general reputation. But, as I have said, that is not permissible.
214. *Paragraph 18.9.1.1 (second sentence)*: this paragraph avers that it is inherently unlikely that the Claimant's reputation within the academic community and the computer science, cryptocurrency, etc, community has been seriously harmed as a result of the publications complained of because (and this is the sentence to which the Claimant objects to):

"All, or the vast majority, of those operating within those spheres (and particularly those who came into contact with the Claimant) would have learnt of the notorious allegation that the Claimant had fraudulently claimed to be Satoshi Nakamoto, which arose out of his failed promises to prove he was Satoshi the April/May 2016 exercises and which formed an intrinsic part of his reputation, from sources other than the publications complained of."

215. For the same reasons as with respect to the previous paragraph this is an obvious infringement of the rule in *Dingle*. I therefore strike out the pink highlighted parts and refuse permission to amend in relation to the blue (which make no sense by themselves in any event).
216. *Paragraph 18.9.1.2*: this is pleaded as part of the Defendant's traversing of [25.9] of the APOC. That paragraph of the APOC, with its sub-paragraphs, alleges specific harm suffered by the Claimant as a consequence of the Defendant's publications, eg, the withdrawal of invitations to speak at conferences. However, with regard to [18.9.1.2] of Appendix C, it is important to note that this specifically traverses the *first sentence* of [25.9], which makes reference to the Claimant's reputation within the academic, etc, community having been harmed by the Defendant's publications. Paragraph 18.9.1.2 responds to this sentence by averring that the Claimant has been involved in other libel proceedings (details of which are given) and then states:

"These claims brought by the Claimant further demonstrate the general notoriety of the allegation that he had fraudulently claimed to be Satoshi Nakamoto. Further, insofar as the

Claimant invites the court to infer that serious harm to his reputation was caused by the publications complained of in this claim, such a case on causation is negated by the fact and nature of the other proceedings brought by the Claimant in respect of other publications with the same meaning during the same period."

217. Again, it seems to me that this offends the rule in *Dingle*. It is not a plea that any specific harm had another specified cause aside from any of the Defendant's publications, such as might have raised 'isolation' issues of the type referred to by Warby J in *Sicri*, supra, [178(7)]. What it is, it seems to me, is an impermissible plea that any general harm to the Claimant's reputation arose from other similar publications. Furthermore, as the Claimant points out and as I have already said, other libel proceedings involving the Claimant *could* be relevant to a plea for a contribution under s 12 of the Defamation Act 1952, but there is no such plea in this case.

218. The Claimant puts the matter thus in his Closing Submissions at [42], after having pointed to the vagueness and width of the material which the Defendant wishes to rely upon:

"The problem is particularly acute when it comes to identifying alternative candidate causes for specific pleaded instances of serious harm. The Defendant has not even tried to do this in his pleading; but if he were to do so, he would need to identify particular publications which he contends caused the specific harm alleged; these would need to be in the correct date range (e.g. during the short pleaded period when the booked conferences were cancelled); would need at least arguably to have been viewed by the same audience as the publications complained of; and would need to bear a meaning at least as seriously defamatory as the Defendant's publications. Otherwise, they could not be viable alternative candidate causes."

219. I accept the Claimant's submission that the Defendant has not pleaded or identified specific alternative causes (third party publications or otherwise) of the specific adverse consequences complained of by the Claimant. I note the Defendant's case on disinhibition to conferences is simply to put the Claimant to proof of it, and no positive alternative case on causation is advanced (Appendix C, [18.9.2.2]). Although, as I have said, Ms Evans took me to a selection of third-party publications, none of these was advanced as having caused adverse consequences to the Claimant above a level of generality. Some of the material dated back some years before the consequences complained of, and would therefore have presented causation difficulties for the Defendant even if the matter had been pleaded. As the Claimant put it in [23(b)] of his Closing Submissions:

"In relation to the Conferences, the invitations cancelled are pleaded at §25.9.2 APoC. The invitations were made in the months before they were cancelled, and then the Claimant was

disinvited after the Defendant's publications. While he might be able to identify specific alternative causes (including publications) if they fell in the same time period (March-April 2019), he could have no arguable case in respect of the many pre-2019 publications he relies upon as a confounding factor."

220. *Paragraph 18.10.1*: this responds to [25.10] of the APOC. That paragraph alleges that the publications have made it more difficult for the Claimant to become a magistrate in Surrey. Paragraph [18.10] of Appendix C responds that: (a) [25.10] is not a proper plea in support of the Claimant's case on serious harm to his reputation; (b) without prejudice to that contention,, [25.10] is denied in so far as it purports to make a case on causation related to the Defendant's publications.; (c) the Claimant's claimed harm is inherently unlikely. None of that is objected to by the Claimant. The paragraph in dispute is as follows (prefaced by the words 'in circumstances where ...')

"18.10.1 the allegation that the Claimant had fraudulently claimed to be Satoshi Nakamoto (arising out of his failed promises to prove himself as such the April / May 2016 exercises) was notorious and an intrinsic part of his reputation, as would have been readily apparent at any material time from a Google search on the Claimant's name; a search which it is reasonably assumed those involved in the recruitment process at the Ministry of Justice would have carried out;

221. The Claimant objects on the basis that prior to the amendment (in green) this paragraph sought to litigate matters (namely, that the Claimant had failed to prove he was Satoshi), which had been pleaded in the abandoned defence of truth. However, even in the proposed amended form, the Claimant submits that this paragraph should be struck out/the proposed amendment refused as it also offends against the rule in *Dingle* (as it applies to serious harm, and no alternative specific cause of any specific harm has been properly pleaded).
222. I agree. This is not an adequate pleading to support a case on alternative causation so as to require the court to try and isolate the cause of this pleaded harm to the Claimant (if it occurred) from the Defendant's publications. No specific facts are pleaded. It is an impermissible plea of rumour and innuendo which is not saved by the vague assertion ('reasonably assumed') that the Ministry of Justice would have done Google searches on the Claimant as part of its magistracy recruitment process.
223. *Paragraph 19.1 and 19.3* (first nine words): earlier I referred to [25.1] of the APOC, which alleges that the Defendant's publications were, by their nature, inherently seriously damaging to the Claimant's reputation. Paragraph 19 of Appendix C avers in response by way of amendment that this contention (which is denied) 'ignores the critical overarching context in this case, as well as the requirement that the Claimant show serious harm as a matter of actual provable fact.' This amendment is not objected to by the Claimant. Paragraph 19.1, which is objected to, is as follows:

"All or at least a very large majority of the readers [and viewers] of the publications complained of, being people with a particular and/or specialist interest in the bitcoin and

cryptocurrency sector, would have known the historic context for the Defendant's allegation that the Claimant was variously "not Satoshi" or "a fraud" or "repeatedly and fraudulently claimed to be Satoshi", namely that summarised in paragraphs 7.1 to 7.4 above. In other words, the allegation – and its basis in the Claimant's failed promises to prove he was Satoshi Nakamoto April / May 2016 exercises – was notorious and had been the subject since May 2016 of continuous widespread global publication within the bitcoin and cryptocurrency sector and in mainstream media, and had thereby become an inherent part of the Claimant's global public reputation. If necessary, the Defendant will refer to the mass of statements published worldwide, including in this jurisdiction, between 2016 and today which demonstrate this."

224. The first nine words of [19.3] are 'That this was the background is also apparent from ...',
225. The Claimant objects to these on the same basis as [18.9.1.2] and [18.10.1], and for the same reasons that I gave earlier, I uphold that objection and refuse permission to amend.
226. *Paragraph [19.4]:* this is as follows:

"Further, the allegation that the Claimant was not Satoshi or fraudulently claimed to be so, was the direct result of the Claimant's own conduct in publicly promising and then failing to prove he was Satoshi in and since April and May 2016. It could not therefore be damage to reputation about which the Claimant could complain in any event. Moreover, the Claimant's stated objective in bringing these proceedings (according to Mr Ayre on his behalf in a tweet on 16 April 2019, four days after the letter of claim was sent to the Defendant and one day before these proceedings were issued: see paragraph 20.1 below), namely to induce "a moron" to "bankrupt themselves trying to prove a negative and then letting Craig show the proof" (that he was Satoshi Nakamoto), by itself demonstrates that the Defendant's publications did not and were not likely to cause serious harm to his reputation. For, were it otherwise, the Claimant would have "shown the proof" before now rather than allowing the allegation to be continuously recycled in the bitcoin and cryptocurrency sector since May 2016. Further, the Defendant will rely on paragraph 20.3 below to contend that the proceedings are not a genuine attempt by the Claimant to vindicate the alleged harm to his reputation, but are a commercial endeavour controlled by third parties for their own and the Claimant's commercial gain."

227. The Claimant objects to this paragraph on the basis that it seeks to re-litigate the abuse of process defence in [20] of the Amended Defence, although the Defendant

has now abandoned that defence. The Defendant's response is that the tweet is relevant to the issue of whether the publications have or were likely to cause serious harm to the Claimant.

228. It seems to me that this paragraph is objectionable for a number of reasons. First of all, whilst I have allowed reference to Mr Ayre principally by way of background explanation as to who he is, given his name and photograph features in some of the publications (see above), he is not a party to these proceedings and what he did or not did not say in a tweet do not appear to me to be relevant. That is all the more so since the abuse of process plea has now been abandoned. This paragraph is very similar to [20.1] of the Amended Defence which formed part of that abandoned defence. Also, the reference to 'continuously recycled' is, it seems to me, another infringement of the rule in *Dingle* as it applies to serious harm, because it is part of an attempt to negate a plea of serious harm by reference to rumour and speculation.

229. *Paragraph 19.6* (after 'effect'): this paragraph is as follows:

"In all these circumstances, for the claim to be actionable the Claimant would have to prove: (a) that he suffered or is likely to suffer serious harm to his reputation in this jurisdiction as a matter of actual provable fact, (b) that it was the actual impact of the ~~Defendant's ten Tweets~~ publications complained of on those to whom the words were published in this jurisdiction specifically which caused that effect, and (c) that it was not caused by the Claimant's notorious failure to prove allegation that the Claimant was had fraudulently claimed to be Satoshi in May 2016, notwithstanding his own promises to do so, and/or published accounts of and/or commentary on that failure allegation, and/or any or a combination of the mass of other publications as aforesaid, including those outside this jurisdiction."

230. The Claimant objects to the suggested amendments and submits that the pink passages be struck on the basis that they offend the rule in *Dingle* and also seek in part to resurrect the abandoned defence of truth. Again, for essentially the same reasons as earlier, I uphold these objections. This is a fairly blatant attempt to say that the Claimant cannot prove serious harm because of the supposedly 'notorious' rumour that he had made fraudulent claims, and that is not permissible. It also pleads that the Claimant had *in fact* failed to prove he was Satoshi – something which formed part of the now abandoned truth defence.

231. So far as the jurisdiction point is concerned, the Claimant accepts that he has to show that it was publications in England which caused the specific harm, and the conferences to which he was disinvited were mainly to be held overseas (Closing Submissions, [22(b)] and [23(c)]). However, he pointed out that the organisers were largely based in England and in the absence of any specific pleaded alternative cause by the Defendant, any jurisdiction argument could not avail him. I agree.

232. *Paragraphs 37.3 (subparagraphs), 37A (and sub-paragraphs) and 38A (from 'further', and sub-paragraphs)*: these paragraphs appear in Appendix C under the

heading ‘Claimed Remedies’. Paragraph 37.3 refers back to [26.4] of the APOC. That sub-paragraph formed part of the Claimant’s plea in [26] for general and/or aggravated damages. It pleaded (improper) motives the Claimant ascribed to the Defendant for publications 1 – 10, as allegedly described by the Defendant in Publication 16 (the ‘Hotep Jesus’ YouTube video). As Mr Wolanski made clear at the hearing, the essence of the Claimant’s claim for aggravated damages concerns the Defendant’s state of mind when he published the words complained of.

233. Paragraph 37.3 responds: (a) that [26.4] ‘distorts the words used by the Defendant in the relevant discussion’ and is denied; and that (b) the Defendant will refer to the video at trial for its full content and context. The Defendant’s reasons for tweeting as he did are then set out in the sub-paragraphs, which are highlighted in blue and which are thus amendments for which the Defendant needs permission. The sub-paragraphs to [37A] and [38A] ascribe motives to the Defendant by way of response to the Claimant’s claim for aggravated damages. I do not think I need set out these paragraphs at length.
234. The Claimant’s position on these paragraphs is set out in his Supplementary Skeleton Argument at [51]:

“In order to assist in the proportionate disposal of this case (and not because the Claimant does not believe his case as to the Defendant’s state of mind to be well founded), if the Court agreed that the Defendant should not be allowed to amend to include the ‘failed’ experiment allegation, or as to the publications by third parties, and thus extend the trial, the Claimant would be prepared to drop his case for aggravated damages, as pleaded in paragraphs 26.3 to 26.8, and 26A of the draft Re-Amended Particulars of Claim, as it is acknowledged that the Defendant would be within his rights to rely on such facts to rebut allegations based on his state of mind. However, this abandonment of the aggravated damages plea would necessarily be contingent on the court striking out those parts of the Amended Defence in which the Defendant continues to advance a case that the Claimant had failed in 2016 to prove he was Satoshi, and as to the third-party publications.”

235. This is expanded in the Claimant’s entry on this paragraph in the Agreed Table, in which he states that if the ‘material offending *Dingle* is struck out’, and he thereby drops his case for aggravated damages, there would be no basis for giving the Defendant leave to amend as sought in these paragraphs of Appendix C; see also Claimant’s Closing Submissions, [18].
236. The Defendant agrees that the question whether permission to amend to include these paragraphs is given depends on whether the Claimant’s aggravated damages is maintained.
237. I have excluded those aspects of Appendix C in which the Defendant attempted to plead matters relating to rumours etc in the cryptocurrency community concerning the

Claimant and thus, consistently with the parties' positions, and subject to the Claimant formally abandoning his claim for aggravated damages, I refuse permission to amend on the grounds that the amendments sought, in that event, will seek to answer a claim which is no longer maintained.

238. *Paragraph 39.1*: the amendment sought by the Defendant in this paragraph, to which the Claimant objects, is the repetition of [37.1] of Appendix C. That paragraph, in turn, responds to [26.1] of the APOC by repeating [18] and [19] of Appendix C. Paragraph [26.1] (and the sub-paragraphs) is the Claimant's plea for general and/or aggravated damages. Paragraphs [18] and [19] contain the Defendant's response to the Claimant's pleaded case on serious harm.
239. As set out in the Claimant's Supplementary Skeleton Argument at [54], there is no objection to this amendment provided I have struck out the parts of [18] and [19] to which the Claimant objected. I have done so, therefore there is no objection to this amendment.
240. That concludes consideration of the Claimant's strike-out application regarding Appendix C and the Defendant's application to amend it. I give permission to the Defendant to re-amend his Amended Defence in a way which is consistent with this judgment, and I grant permission to the Claimant if so advised to re-amend his Amended Reply.
241. Lastly, the Defendant sought to rely on other publications in reliance on the case of *Burstein*, supra, which held that the defendant was entitled to adduce evidence of 'directly relevant background context' in mitigation of damages. The purpose of doing so is to guard against the risk of damages being assessed on a false basis. Ms Evans put the matter this way (18 February 2021, p100-101):

"The principle is to make sure a claimant doesn't get vindication that he doesn't deserve because his reputation actually doesn't stand for it. That's why, in some situations the court would be prepared to take into account evidence which is described variously as directly relevant background context; in other words evidence which sheds some light on what it is that the claimant is alleged to have done short of truth, or in another related aspect of his sector of his reputations. The point being that the court shouldn't be in blinkers when it makes a decision about whether to award somebody damages. And we suggest that this case is actually, at the very least, arguably in the *Burstein* arena and could even be a relatively good example of it when you look at again, as I say, the background to the claimant's claim, which is the notoriety arisen as a result of his claims to be Satoshi and the perception that he's scamming everyone because he's never actually proven it."

242. In my judgment, the answer to this submission is two-fold. Firstly, no *Burstein* facts have been pleaded: the matter was raised for the first time in the Defendant's Skeleton Argument (see above), and amplified orally by Ms Evans. Second, in *Turner*, supra, the Court said at [56]:

“The Court of Appeal in *Burstein's* case was concerned to avoid jurors having to assess damages while wearing blinkers. If evidence is to qualify under the principle spelt out in *Burstein's* case, it has to be evidence which is so clearly relevant to the subject matter of the libel or to the claimant's reputation or sensitivity in that part of his life that there would be a real risk of the jury assessing damages on a false basis if they were kept in ignorance of the facts to which the evidence relates.”

243. It seems to me that third party publications of the type relied on by the Defendant making the same or similar defamatory allegations, the truth of which the Defendant does not maintain and which the Claimant denies, do not fall within this principle.

The Defendant's Third Witness Statement

244. The Claimant takes objection to, and seeks to strike out, parts of the Defendant's Third Witness Statement of 12 February 2021 (Appendix B) and to parts of Ex PM3 which is exhibited to it. The bases for objection are principally set out in [56]-[61] of his Supplementary Skeleton Argument. The Defendant has responded to these in his Closing Submissions at [55]. The parties' positions are, in summary, as follows.
245. *Paragraphs 15, 16 and 17 (and p18 of the exhibit PM3)*: these refer to the costs incurred by the Claimant and Mr Ayre, who is said to be his billionaire 'backer'. Page 18 is a page of tweets, including one from Mr Ayre in which he refers to 'waiting for a volunteer to bankrupt themselves'. They allege that it has been the Claimant's and Mr Ayre's 'intention all along' to exploit their relative wealth so that the Defendant cannot afford to defend himself. Objection is taken because they are said to relate only to the now-abandoned abuse of process defence.
246. In response, the Defendant says that the Claimant's purposes in pursuing the litigation are relevant to the Defendant's case on aggravated damages and serious harm.
247. I disagree. The abuse of process plea has been abandoned, and the centrepiece of that was the Claimant and Mr Ayre's motive. These paragraphs are now redundant, especially as I anticipate that the aggravated damages plea will be withdrawn by the Claimant, as indicated earlier.
248. *Paragraph 19*: this refers to the 'biggest controversy' in the cryptocurrency sector as being whether the Claimant is Satoshi, and that 'most people with an interest in the sector, including myself, believe that to be a fraudulent claim, in particular following his failure to make good on his promises to provide proof ...' This is said to offend against rule in *Dingle* and to advance a factual case (that the Claimant failed to prove he was Satoshi) which was part of the abandoned plea of truth.
249. In response, the Defendant says that this allegation is relevant to the Defendant's case on innuendo meaning, serious harm, mitigation of damages and aggravated damages.
250. I uphold the Claimant's objection and strike out this paragraph. I have rejected the Defendant's case on innuendo meaning, and such evidence is not admissible either on

the question of serious harm or mitigation of damage. The aggravated damages plea is likely to be withdrawn.

251. *Paragraphs 23 and 24, and pp51-93 of Ex PM3*: these state that the Defendant intends to make submissions on materials which were exhibited to his (now withdrawn) First Witness Statement in relation to serious harm and damage. These include Twitter analytics (Ex PM3, pp51-91) showing the number of tweets responsive to hashtags such as #craigwrightisafraud, and other terms linking the Claimant's name with words such as fraud/fake/liar. Objection is taken on the grounds that (a) such evidence offends against the rule in *Dingle*; (b) vagueness: the point is made that the materials exhibited to the first witness statement run to about 1000 pages, and the Defendant cannot be permitted to be so general, and (c) the material referred to is opaque.
252. For the reasons given earlier, such material and the use to which the Defendant wishes to put it plainly offends the rule in *Dingle*, and I uphold the Claimant's objection on that basis.
253. *Paragraphs 25 to 35, together with Ex PM3, pp94 – 129*: these are headed 'My reasons for tweeting' and reply to the Claimant's case on motive that has been pleaded in support of his claim for aggravated damages. The Claimant says these paragraphs fall away if he were to drop his case on aggravated damages.
254. I anticipate in light of my decision earlier on this aspect of Appendix C that the Claimant will withdraw his claim for aggravated damages and so I need not say any more about these paragraphs.
255. *Paragraphs 36 to 38*: the Claimant does not object to these paragraphs insofar as the evidence could be relevant to mitigation of damages, but says that these paragraphs cannot be relevant on the question of serious harm to reputation. On that basis I need not say any more.

Conclusion

256. I invite the parties to draw up an order consistent with the terms of this judgment.