



Neutral Citation Number: [2020] EWHC 51 (QB)

Case No: QB-2019-002311

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/01/2020

Before:

MR JUSTICE JAY

Between:

CRAIG WRIGHT

Claimant

- and -

MAGNUS GRANATH

Defendant

Adam Wolanski QC and Greg Callus (instructed by SCA ONTIER LLP) for the Claimant
Hugh Tomlinson QC and Darryl Hutcheon (instructed by Atkins Thomson Ltd) for the
Defendant

Hearing date: 12th December 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE JAY

MR JUSTICE JAY:

Introduction

1. Dr Craig Wright is a computer scientist with a particular interest in cryptocurrencies. He has lived in the UK since December 2015. It is alleged that he claims, or has claimed, to be the creator of Bitcoin using the pseudonym of “Satoshi Nakamoto”.
2. Mr Magnus Granath is a citizen of Norway resident in Oslo. He tweets on various technology issues, including cryptocurrencies, using the handle “@Hodlonaut”. In March 2019 he had approximately 8,000 followers of whom about 560 were in the UK. Mr Granath, amongst others, believes that Dr Wright’s claim to be “Satoshi Nakamoto” is false.
3. On 17th March 2019 Mr Granath posted an anonymous tweet using his Twitter handle, in these terms:

“The forensics to CSW’s first attempt to fraudulently ‘prove’ he is Satoshi. Enabled by @gavinandresen. Never forget. @CraigWrightIsAFraud.”
4. Without extrinsic facts it is not entirely clear what this means. Dr Wright’s case is that the tweet bears the following innuendo meaning:

“... [Dr Wright] had fraudulently claimed to be Satoshi Nakamoto, that is to say the person, or one of the group of people, who developed the crypto currency Bitcoin.”
5. Before proceedings were instituted in this jurisdiction, Mr Granath brought a claim in the District Court of Oslo seeking, in essence, negative declaratory relief (“NDR”): in other words, relief to the effect that he is not liable to pay damages for libel in connection with his publication of the Tweet. It follows that this Court is not the “court first seised” for the purposes of the Lugano Convention 2007.
6. In these circumstances, Mr Granath seeks orders (1) pursuant to CPR r.11(1), declaring that the Court should not exercise its jurisdiction in these proceedings, and (2) pursuant to r.11(6), setting aside service of the Claim Form and/or dismissing the proceedings. His application is brought under the mandatory provisions of Article 27 of the Lugano Convention which apply if the proceedings in this Court involve the same cause of action as the Oslo proceedings.
7. In view of the parties’ submissions, there are two issues which require my resolution, viz.:
 - (1) do both sets of proceedings involve the same cause of action (“*le même objet et la même cause*”)?
 - (2) if so, does Dr Wright enjoy a substantive right as a victim of defamation to sue in the UK, being a right which cannot by its very nature be displaced by Article 27?

Procedural History

8. On 29th March 2019 Dr Wright's solicitors sent a letter of claim to Mr Granath via Twitter. It set out the terms of nine tweets on the Hodlonaut account posted between 13th and 18th March but limited the libel complaint to the one sent on 17th March. At that stage Mr Granath's identity as author of the tweets was unknown.
9. The letter of claim sought a number of remedies including that Mr Granath identify himself, remove the tweets from his twitter feed, undertake not to repeat the allegation of dishonesty, apologise, and assent to the making of a statement in open court.
10. Following receipt of the letter of claim, Mr Granath deleted these nine tweets without making any admission of liability.
11. On 19th May Mr Granath issued proceedings in the Oslo District Court seeking a declaratory judgment that he was not liable to pay damages to Dr Wright in respect of the nine tweets. These proceedings were served in June. Meanwhile, on 20th May Mr Granath identified himself as Hodlonaut when he returned the letter of claim signed with his name.
12. On 26th June Dr Wright issued the Claim Form in the present action. This was accompanied by Form N510 setting out the basis on which he was entitled to serve the proceedings out of the jurisdiction without the Court's permission. The form certified that there were no proceedings between the parties concerning the same claim in any other Convention territory.
13. On 6th August the Claim Form and Particulars of Claim were served in Norway.
14. On 19th August Dr Wright filed and served a Notice of Defence in the Norwegian proceedings. He asked the Oslo District Court (1) to dismiss the proceedings for want of jurisdiction, alternatively (2) that the case be referred to the Oslo Conciliation Board, or in the further alternative (3) that the case be stayed pursuant to Article 28 of the Lugano Convention because there was a pending similar action in England against another individual.
15. On 21st August Mr Granath filed an Acknowledgment of Service. He issued the CPR Part 11 application on 2nd September (sealed by the Court the following day). In these circumstances, he was not required to, nor could he, file a Defence.
16. On 6th December the Oslo District Court dismissed Dr Wright's applications on all three bases. I shall focus on the first. The Court concluded that there was jurisdiction to bring negative actions for a declaration (see *Folien Fischer AG v Ritrama SpA*, Case C-133/11, [2013] QB 523), that the relief sought was "global" in the sense that it was not limited to any harm or loss suffered in Norway, and that Article 5(3) of the Lugano Convention was applicable because the "harmful event" occurred in Norway. I understand that Dr Wright is considering an appeal but for present purposes I must proceed on the footing that the Oslo District Court has accepted jurisdiction.
17. On 9th December Dr Wright issued an application to adduce expert evidence of Norwegian law. He has failed to give the requisite three days' notice. Mr Granath objects to the adduction of this evidence. Although I read it *de bene esse* before the

hearing started, it was only touched on by Mr Adam Wolanski QC during the course of his oral argument; and in my view, it takes the matter no further.

The Pleadings in the Two Sets of Proceedings

18. The Opening Writ in the Oslo District Court has been translated by a Government Authorised Translator. It is more discursive than Particulars of Claim in this jurisdiction, and I have read it without any knowledge of Norwegian law. I think that it would be unsafe to apply the interpretative skills of an English lawyer to this particular document.
19. According to the Opening Writ, the case concerns “Question of libel on Twitter”. Mr Granath claims “a declaratory judgment that [he] is not liable to pay damages to [Dr] Wright” in relation to the nine tweets. It is averred that Norwegian law applies. The material section of Part 3 of the Opening Writ, “Basis of Claim”, provides as follows:

“In order that Wright shall have a claim for damages from Granath’s allegations on Twitter, the allegation must be made negligently, and they must be libellous and unlawful, see Damage Compensation Act (Damages Act), section 3-6a.

Granath believes he can substantiate that Wright is not Satoshi Nakamoto and that Granath’s allegations are correct. Therefore, they are not libellous. Neither has Granath acted negligently in relation to the statements. In any case, Granath had honourable reasons to put forward the allegations. Freedom of expression is a key human right under both the Constitution of Norway, Article 100, and the ECHR, Article 10. Granath’s statements are within the wide framework of freedom of expression that these rules establish. This means that the statements are not unlawful, regardless of whether they are accessible in Norway, the EU or other countries.

In the alternative, we will argue that even if the statements are libellous, Craig Wright has not suffered any loss, and there is no basis on which to award him restitution for non-economic loss. His reputation was long damaged even before Granath put forward the allegations on Twitter.

Accordingly, we ask the Court to find in favour of Granath regarding the claims by Wright. We will also ask for a declaratory judgment that Granath’s statements on Twitter about Wright are lawful.”

20. The Particulars of Claim in these proceedings relate only to the 17th March tweet. I have already set out the pleaded innuendo meaning. It is averred that the publication of the words complained of caused serious harm to Dr Wright’s reputation. The relief sought is: (1) damages, including aggravated damages, for libel; (2) an injunction restraining further publication; and (3) an order under section 12 of the Defamation Act 2013 that Mr Granath publishes a summary of the judgment in the proceedings.

21. The witness statement of Mr Mark Thomson, solicitor for Mr Granath, explains that his client does not accept that the serious harm threshold has been met in relation to the single tweet sought to be litigated in this jurisdiction. He does not state in terms what the defences would be if this present application were to fail, but I think that is implicit that – at the very least – the defences of truth and qualified privilege would be relied on. Whether Dr Wright’s claimed innuendo meaning is accepted is unclear: this is equally so in relation to the Opening Writ in the Oslo District Court, about which Mr Thomson wisely refrains from expressing an opinion.

Relevant Provisions of the Lugano Convention 2007

22. I set out the relevant parts of Articles 5, 27 and 28:

“Special jurisdiction

Article 5

A person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued:

...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

...

Lis pendens — related actions

Article 27

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different States bound by this Convention, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 28

1. Where related actions are pending in the courts of different States bound by this Convention, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised

has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.”

Jurisprudence Relevant to the First Issue

23. At this stage I propose to review the key authorities bearing on the *lis pendens* issue and Article 27. The section of Mr Wolanski’s skeleton argument (paras 25-40) which was directed to the cases on jurisdiction seem to me to be more germane to the second issue.

24. In *Gubisch Maschinenfabrik KG v Palumbo* (Case C-144/86) [1989] ECC 420, the focus was on Article 21 of the EEC Judgments Convention which was not materially different from Article 27 of the Lugano Convention. Gubisch had sued in Germany for the price paid under a contract for sale; Palumbo subsequently sued in Italy for declaratory relief that the contract did not exist because he had revoked the order before it had been accepted, alternatively that it should be rescinded, and in the further alternative that it should be discharged for breach. These two claims were not entirely identical although they clearly arose out of the same contractual relationship. The question was whether they shared the same “subject-matter”.

25. The ECJ held, at para 16:

“In particular, in a case such as this, involving an international sale of tangible property, it is apparent that the action to enforce the contract is aimed at giving effect to it, and that the action for its rescission or discharge is aimed precisely at depriving it of any effect. The question is whether the contract was binding therefore lies at the heart of the two actions. If it is in the action for rescission or discharge of the contract that is brought subsequently, it may even be regarded as simply a defence against the first action, brought in the form of independent proceedings before a court in another contracting state.”

In these circumstances, the subject-matter of the two claims was the same (para 17), and the risk that a judgment in one Contracting State would not be recognised in another was obviated (para 18).

26. I draw the following principles from *Gubisch*:

(1) in a case involving the application of the concept of *lis pendens*, the Court must seek to identify whether there is a common question which lies at the heart of the two actions. On the facts of *Gubisch*, that question was whether the contract was binding.

(2) the foregoing exercise requires some analysis of the essential basis of the claims brought in each jurisdiction, although that analysis could not be conducted with

reference to the principles, rules and provisions of domestic law, as to which there was no evidence.

(3) it was clear that the second claim was the mirror image of the first. The basis of the Italian claim was that the contract was not binding; the basis of the German claim was that the contract was binding.

(4) in that particular sense, it could be said that the second claim was “simply a defence against the first action”.

27. I have drawn attention to (4) above because I think that it is capable of being misunderstood. There is a clear line of authority which holds that pleaded defences must be ignored for the purposes of deciding whether the second claim advances the same cause of action as the first. That is not the same as saying that, after examining the pleaded *claims* in both actions, each is effectively the mirror image of the other, and in that particular sense the second claim could have been pleaded as a defence to the first.
28. In *The Owners of the Cargo Lately Laden on Board the Ship ‘Tatry’ v The Owners of the Ship ‘Maciej Rataj’* (Case C-406/92) [1999] QB 515, the focus was on Article 21 of the Brussels Convention and a *lis pendens* provision effectively the same as Article 27 of the Lugano Convention. The shipowners brought proceedings in Rotterdam seeking a declaration that they were not liable for the contamination of the cargo; the cargo owners subsequently brought claims in damages in relation to the same cargo in this jurisdiction. The case was therefore the mirror image of *Gubisch* with the slight caveats, held to be immaterial, that there were two separate contracts and the second claim was wider in scope than the first.
29. The CJEU made it clear that the concept of *lis pendens* was applicable to the situation where the claimant in the court first seised was seeking a declaration of non-liability: see paras 46-48, and Advocate General Tesauro at paras 21-23. In relation to this question, matters of domestic law were irrelevant.
30. The CJEU addressed the terminology of “same cause of action” in Article 21 of the Brussels Convention in the following way:

“37. The national court’s fifth question is essentially whether, on a proper construction of Article 21 of the Convention, an action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action and the same object as earlier proceedings brought by that defendant seeking a declaration that he is not liable for that loss.

37. It should be noted at the outset that the English version of Article 21 does not expressly distinguish between the concepts of “object” and “cause” of action. That language version must however be construed in the same manner as the majority of the other language versions in which that distinction is made (see the judgment in *Gubisch Maschinenfabrik v Palumbo*, cited above, paragraph 14).

38. For the purposes of Article 21 of the Convention, the "cause of action" comprises the facts and the rule of law relied on as the basis of the action.

39. Consequently, an action for a declaration of non-liability, such as that brought in the main proceedings in this case by the shipowners, and another action, such as that brought subsequently by the cargo owners on the basis of shipping contracts which are separate but in identical terms, concerning the same cargo transported in bulk and damaged in the same circumstances, have the same cause of action.

40. The "object of the action" for the purposes of Article 21 means the end the action has in view.

41. The question accordingly arises whether two actions have the same object when the first seeks a declaration that the plaintiff is not liable for damage as claimed by the defendants, while the second, commenced subsequently by those defendants, seeks on the contrary to have the plaintiff in the first action held liable for causing loss and ordered to pay damages.

42. As to liability, the second action has the same object as the first, since the issue of liability is central to both actions. The fact that the plaintiff's pleadings are couched in negative terms in the first action whereas in the second action they are couched in positive terms by the defendant, who has become plaintiff, does not make the object of the dispute different.

43. As to damages, the pleas in the second action are the natural consequence of those relating to the finding of liability and thus do not alter the principal object of the action. Furthermore, the fact that a party seeks a declaration that he is not liable for loss implies that he disputes any obligation to pay damages.

45. In those circumstances, the answer to the fifth question is that, on a proper construction of Article 21 of the Convention, an action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action and the same object as earlier proceedings brought by that defendant seeking a declaration that he is not liable for that loss."

31. Thus, the "cause of action" was the same because, although one claim was for a declaration of non-liability and the other was for the imposition of liability and damages, the centrepiece of both claims was the same contaminated cargo. The "object" was the same because both parties were seeking a determination of liability or its absence, which were opposite sides of the same coin. One (the first in time) was the negative, the other was the positive.

32. In *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV* (Case C-111/01) [2003] ECR I-4207, the “cause of action” in proceedings in the Netherlands and then in Austria was different because a claim for damages for repudiation of a contract and a claim for the price of goods delivered before repudiation could both have succeeded, and there was no inherent incompatibility – as in English law, a repudiatory breach did not discharge primary obligations which had already arisen. For this purpose, account could be taken only of the claims of the respective parties, and not to any defence which might be raised by a defendant.
33. In *Mærsk Olie & Gas A/S v Firma M de Haan en W de Boer* (Case C-39/02) [2005] 1 CLC 479, the subject matter of the two sets of proceedings was a pipeline owned by Mærsk damaged by W de Boer’s vessel. The claim in the Netherlands was for a declaration that liability was limited under an international Convention and Dutch legislative provisions which gave effect to it. The later claim in Denmark was for compensation. The CJEU held (para 38) that:
- “... even if it be assumed that the facts underlying the two sets of proceedings are identical, the legal rule which forms the basis of each of those applications is different. ... The action for damages is based on the law governing non-contractual liability, whereas the application for the establishment of a liability limitation fund is based on the 1957 Convention and the Netherlands legislation which gives effect to it.”
34. In *J.P. Morgan Europe Ltd v Primacom AG* [2005] EWHC 508 (Comm), [2005] 2 Lloyds Reports 665, the borrowers in the first set of proceedings in Germany sought declaratory relief that the lenders were not entitled to interest under a facility agreement by virtue of certain provisions of German law and public policy; the lenders then instituted proceedings in this jurisdiction seeking declarations to the contrary effect. Cooke J held that there was identity of “cause of action” – the term bearing an independent and autonomous meaning in European law divorced from any criteria of national law. In particular:
- “45. Fundamentally, it is the rights and obligations of the parties in relation to the same facts which, in my judgment, matters here. Each court will be concerned with the respective rights and obligations of the parties, however those are classified and determined by the national courts of each country. ...
- ...
47. ... The way the claim is framed and the arguments in support of it may fall to be taken into account, but ultimately, the question must be seen broadly in terms of the judgment sought and not in terms of the issues raised on the way.”
35. At para 47 Cooke J also specifically rejected the proposition that the test in a *lis pendens* case was “to ask whether a decision in one set of proceedings would be a conclusive answer to the questions raised in the other”. Thus, the fact that the German court would be addressing questions of public policy which would not arise in this

jurisdiction, and would therefore be approaching one aspect of the enforceability of the loan agreement in a different way, was not a relevant factor: it was in the nature of an issue raised on the way. The key point was that the enforceability of the loan agreement, and the reciprocal rights and obligations of the parties under it, was the common theme both in Germany and here. Put another way (see para 42), the examination must be of “the basic facts (whether in dispute or not) and the basic claimed rights and obligations of the parties to see if there is coincidence between them”.

36. In *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* [2013] UKSC 70, [2014] 1 All ER 590, Lord Clarke JSC brought together the relevant principles at paras 28-30 of his judgment. I do not believe that it is necessary to set these out in full. By way of summary:

- (1) identity of “cause” means that the facts and the rules of law relied upon as the basis for both actions must be the same.
- (2) identity of “objet” means that the both proceedings must have the same end in view.
- (3) Cooke J’s judgment in the *J.P. Morgan* case was approved.
- (4) for the purposes of the assessment, only the claims in each action may be considered, not any defences.
- (5) the existence of a discretionary power to stay proceedings under what is Article 28 of the Lugano Convention (the Supreme Court was considering an analogous provision elsewhere) means that there is no need to strain to fit a case within Article 27: this provision is reserved for relatively straightforward situations.
- (6) “the essential question is whether the claims in England and Greece are mirror images of the other, and thus legally irreconcilable ...” (para 30).

37. Finally, in *Easy Rent a Car Ltd v Easygroup Ltd* [2019] 1 WLR 4630, the defendants had brought proceedings in Cyprus seeking declarations to the effect that they could use disputed trade marks under the terms of what they claimed to be a settlement agreement between the parties; the claimant in this jurisdiction was seeking relief in respect of alleged infringements and passing off. The Court of Appeal (David Richards LJ giving the sole reasoned judgment) held that there was identity of “cause” and “objet”, notwithstanding that the respective claims were in contract and in tort. The absence of the claimant’s consent was part of its cause of action (as understood in the domestic law sense) in the English proceedings (paras 35 and 36), and “the very matter being asserted by the defendants in the Cypriot proceedings is that the claimant consented to the use of the marks.”. Accordingly (para 40):

“If the claims in the English and Cypriot proceedings are examined, without regard to any possible defences, it is apparent that the claimant’s consent to the defendants’ use of the marks, or lack of such consent, is an essential element of both claims. While the Cypriot proceedings are more extensive in the relief sought than the English proceedings, so that there is

not a complete overlap between the proceedings, the essential question is whether the “cause” in the English proceedings is mirrored in the Cypriot proceedings. It is, in my judgment, as regards the issue of consent.”

38. Counsel before me did not consider it necessary to make submissions on paras 41-52 of David Richards LJ’s judgment. With respect, I consider that these are important. Counsel for the defendants had given an undertaking that his clients in the Cypriot proceedings would not challenge the validity of the trade marks in that jurisdiction. It followed that the contest in those proceedings would be confined to the effect of the alleged settlement agreement, and the issue of consent. The issues in the English proceedings were broader: consent was included amongst them, but the question of validity of the marks was also in play.
39. David Richards LJ pointed out that any challenge to the validity of the claimant’s trade marks in the English proceedings would have to be by way of defence and counterclaim, which for these purposes must be disregarded. Further, the Particulars of Claim raised various factual issues on which the claimant could fail before the issue of consent fell to be considered at all. Although there was undoubtedly the potential for irreconcilable judgments in both sets of proceedings, the English proceedings entailed additional elements of the relevant “causes”.
40. This situation was, as David Richards LJ explained, novel. The two claims were not the exact mirror images of each other. However, Cooke J’s analysis in the *J.P. Morgan* case (at para 42) was germane. There was sufficient coincidence between the basic facts, whether disputed or not, and the basic claimed rights and obligations of the parties. Accordingly (at para 49):

“While the scope of the dispute in the Cypriot proceedings may be narrower than in the English proceedings, that which is not disputed in the Cypriot proceedings is in effect assumed in the claimant’s favour, narrowing the case to the single issue of consent. Fundamentally, the “cause” and, as is common ground, the “objet” of the two sets of proceedings are the same.”

This reasoning proceeds on the basis that Counsel’s undertaking in the English proceedings as to what would be placed in issue in the Cypriot proceedings was binding.

41. There was a further, additional basis for the Court of Appeal’s decision. As David Richards LJ explained at paras 50 and 51, the defendant’s claim in the Cypriot proceedings was drafted in very wide terms, being “wide enough to encompass a challenge to all or any of the facts and matters on which the claimant relies in the English proceedings”. Whether or not the undertaking was enforceable, any challenge to the validity of the trade marks here would have to be by way of defence and counterclaim; and therefore excluded from account. On the other hand, ignoring the undertaking, the claim in Cyprus “was and remained in a form that potentially put in issue all the elements of the claimant’s claim in the English proceedings”.

42. The way in which I interpret the Court of Appeal’s judgment in the *Easygroup* case is as follows. It mattered not that one claim was in contract, the other in tort (statutory and common law). There were two different ways in analysing the case which led to the same conclusion. The first route to that conclusion was to say that the effect of the undertaking was to limit the scope of the Cypriot proceedings to the issue of consent. The English litigation may have been broader in scope but fundamentally the “cause” of the two sets of proceedings was the same. The second route was to say that the undertaking was irrelevant for these purposes. From the perspective of the English proceedings, any issue as to the validity of the trade marks could be raised only by defence and counterclaim (and therefore fell to be discounted). From the perspective of the Cypriot proceedings, the matter should be considered with reference to the pleadings alone, and these were in a form that potentially put all the elements of the claimant’s claim in the English proceedings in issue.

The Parties’ Submissions on the First Issue

43. The submissions of Mr Hugh Tomlinson QC for Mr Granath on the first issue may be stated more briefly than Mr Wolanski’s. The points he advanced both orally and in writing were less complex and perhaps subtle than his opponent’s. That should not be understood as any form of criticism. The fact that he repeated his key argument more than once was probably due to his concern that I had not properly understood it. I do not believe that this was so, but I can assure both parties that I read and re-read the transcript of the hearing before preparing this judgment.
44. Mr Tomlinson submitted that there was identity of “cause” and of “objet” in this case. It is necessary to examine the basic questions raised by both sets of proceedings and to identify their essential elements. What is not required is any sort of micro-analysis of the issues, still less an analysis which engages matters of Norwegian law. There is an identity of “cause” because lying at the heart of both claims is the basic question of whether Dr Wright has suffered actionable reputational damage as a result of the publication of the tweet; or, put another way, is able successfully to assert his claim that he has been libelled. There is identity of “objet” because both parties are seeking to establish either the existence or non-existence of that liability, as the case may be. An examination of the Opening Writ in the Oslo District Court shows that Mr Granath’s purpose was and is to shield himself from a liability in defamation which Dr Wright was seeking to establish in England.
45. As is explained at para 48 of Mr Tomlinson’s Skeleton Argument:
- “The correctness of this position can be tested by referring back to the risk of irreconcilable judgments. The Court in the Norwegian proceedings is going to decide whether the Tweet is libellous. The English Court, if Dr Wright is allowed to proceed, would then have to decide the same thing. Opposite conclusions may be reached in the two sets of proceedings.”
46. When pressed by me in oral argument, Mr Tomlinson submitted that in the Norwegian proceedings Mr Granath had assumed the burden of proving that Dr Wright is a fraud: indeed, he had assumed the burden of proving the essential elements of his defence. In the event that Mr Granath lost the claim for NDR in Norway, Dr Wright would then be able to bring proceedings in this jurisdiction

seeking damages, injunctive relief etc. and issue estoppels, if not a *res judicata*, would arise. Further, in the event that Mr Granath succeeded on the issue of truth in the Oslo District Court, any proceedings in this jurisdiction would be ripe to be struck out as an abuse of process in advance of any Defence being filed.

47. Mr Wolanski submitted that not all claims for NDR are the same as (in the sense of being the mirror image of) a positive claim. In a contractual situation, both parties are potential claimants and potential defendants, and the sole question is upon whom the loss should fall. The legal relationship between contractual counterparties is essentially symmetrical. By contrast, in a non-commercial tortious claim the parties' legal relationship is asymmetrical. The victim is not a potential defendant to the positive claim; the tortfeasor is not a potential claimant in any positive claim.
48. Mr Wolanski submitted that in an asymmetrical tortious claim, if the tortfeasor wins his claim for NDR that gives him no positive claim in a separate jurisdiction. Contrariwise, if the tortfeasor loses the NDR claim that does not confer on the victim an entitlement to declaratory relief elsewhere. This is because "the failed NDR claim has no purchase whatsoever, except perhaps some issue estoppel". Furthermore, an NDR claim can succeed upon establishment of a single element, whereas a victim in a positive claim must make out all the elements of his claim in order to prevail.
49. In any case, submitted Mr Wolanski, there are two different types of situation catered for by NDR claims. As he explains at para 50 of his Skeleton Argument:

"... while an NDR claim that sought negative declarations on the basis of all the positive elements of a cause of action might be a 'mirror image', an NDR claim that merely asserted that the tortfeasor was not liable because of a watertight *defence* to the cause of action would not have commenced a mirror image of the *claim*, he would have commenced a mirror image of the *defence* to that claim (which upon the authority of the CJEU *Gantner* cannot be considered)."
50. As became clearer during the course of his effective oral submissions, Mr Wolanski contended that the instant case falls under the second category. He relied on the following considerations taken both individually and cumulatively:
 - (1) no point is taken in the Norwegian proceedings as to the meaning, including the innuendo meaning, of the words complained of. Indeed, it is not pleaded in those proceedings that, but for the defences of truth etc., the tweet would not be defamatory in any event.
 - (2) the only contention made in those proceedings which falls under the rubric of "no cause of action" as opposed to "defence" is that the tweet was not made negligently.
 - (3) the issues of serious harm and dishonesty do not arise in the Norwegian proceedings. This second aspect is particularly important because it would be open to the English court to find that Dr Wright was not Satoshi Nakamoto but honestly believed that he was: for example, if it concluded that Dr Wright was a member of a team of people that created Bitcoin and he honestly believed that he

was the principal creator, but in fact some other person had a stronger claim to be so and was therefore properly to be described as Satoshi Nakamoto.

- (4) the Norwegian proceedings cover not just one tweet but several.
- (5) Dr Wright in the English proceedings is claiming damages and an injunction which forms of relief could only, if at all, be counterclaimed in Norway.
- (6) overall, there are no features of Dr Wright's claim in respect of which Mr Granath is seeking NDR in Norway. The entire basis of the NDR claim is that Mr Granath has a sound defence.

51. Finally, Mr Wolanski submitted that the two sets of proceedings lacked the same "objet". This was because the purpose of the claim in this jurisdiction is clearly the vindication of Dr Wright's reputation rather than anything that might flow from a claim for NDR.

Analysis and Conclusions on the First Issue

- 52. This case raises a novel point on the *lis pendens* doctrine in the context of the application of Article 27 of the Lugano Convention to defamation cases. Mr Wolanski is correct in pointing out that most of the case law is directed to contractual claims where on any view the characterisation of the subject-matter and of the governing rules of law may more readily be identified. Further, I am not overlooking Rix J's observation in *Glencore International AG v Shell International Trading and Shipping Co Ltd* [1999] 2 All ER (Comm) 922, at 929 (cited with approval in *Starlight*), that "it is only in relatively straightforward situations that [Article 27] bites". Mr Granath does not mount an alternative case based on Article 28.
- 53. However, the *lis pendens* doctrine is not confined to contractual situations, and I have taken time to analyse the decision of the Court of Appeal in the *Easygroup* case. It is clear from David Richards LJ's judgment that the court must examine with some care and particularity the issues between the parties on the pleadings, without delving beyond that into questions of domestic law in a jurisdiction with which it cannot be familiar. These issues are identified at a relatively high level of legal abstraction in order to ascertain whether there is a risk of irreconcilable decisions on the same point.
- 54. The applicability of the *lis pendens* doctrine to tortious situations, albeit not necessarily to all such situations, calls into question one of the ways in which Mr Wolanski put his case on "asymmetry". According to para 44 of his skeleton argument, the victim is not a potential defendant to the positive claim; the tortfeasor is not a potential defendant in any positive claim. I disagree. Once it is posited that a claim for NDR in a tort claim is acceptable (subject to issues of double-actionability and so forth), the "asymmetry" postulated by Mr Wolanski disappears. The fact that the victim – and I agree that it will usually be clear who the victim is, in contrast to the contractual situation – may have to assert her or his affirmative right to compensation either by counterclaim in the relevant action or by subsequent claim in the same or a different jurisdiction is nothing to the point.
- 55. I have derived the greatest assistance from the judgment of Cooke J in the *J.P. Morgan* case. Paras 42-47 of his judgment need to be read with particular care, and

although I have not set these out in full at §34-35 above I have endeavoured to do this. For present purposes, it seems to me that there are two passages which warrant the closest attention, namely (and partially by way of repetition):

“... The expression ‘legal rule’ or ‘rule of law’ appears to mean the juridical basis upon which arguments as to the facts will take place so that, in investigating ‘cause’ the court looks to the basic facts (whether in dispute or not) and the basic claimed rights and obligations of the parties to see if there is coincidence between them ...[strictly speaking, this was Cooke J’s summary of counsel’s submission, but it is clear that he endorsed it]

... The way the claim is framed and the arguments in support of it may fall to be taken into account, but ultimately, the question must be seen broadly in terms of the judgment sought and not in terms of the issues raised on the way.”

56. In the light of the parties’ submissions, it seems to me that the key questions I must address are the following:
- (1) how broadly must the question(s) be framed?
 - (2) what is meant by the phrase in parenthesis, “whether in dispute or not”?
 - (3) is the fact that Mr Granath appears to be relying in Norway on what in this jurisdiction would be statutory defences to a defamation claim critical?
57. These questions fall to be addressed compendiously.
58. By applying late in the day to adduce expert evidence of Norwegian law, and failing, Mr Wolanski was I think in danger of inviting me to address the questions in the parallel sets of proceedings in too narrow a manner. This exercise would have entailed the sort of error pointed out by Cooke J in the context of examining German law principles of public policy.
59. Mr Tomlinson urged on me a very broad formulation, viz. the common issue is whether the tweet is actionably defamatory. The breadth of this formulation causes me no difficulty in a number of important respects. Both sets of proceedings involve the same tweet; the fact that the Norwegian proceedings involve a greater number of tweets is irrelevant for these purposes (the greater includes the lesser); and there is nothing in the point that Dr Wright is expressly claiming in this jurisdiction that the tweet has imputed to him dishonesty, because the same must apply in Norway. The tweet was written in English and its meaning, defamatory or otherwise, must be ascertained.
60. However, Mr Tomlinson’s formulation is in danger of ironing out any difficulties which inhere in the third key question I have posed. On his submission, the tweet would be actionable if there were no proper defence to it, and in such circumstances subsequent proceedings instituted here could not be defended; or, put the other way round, if the “defence” of truth or public interest succeeded in Norway it would be an

abuse of process to litigate here. Whichever way one examines this, the viability of what we would call the defences is central to Mr Tomlinson's submission. I consider that further analysis is required.

61. A simpler hypothetical version of the present case may throw light on the correct analysis. Imagine that the sole issue taken by Mr Granath in his Opening Writ in the Oslo District Court was what we would characterise as the innuendo meaning of the tweet. On these assumed facts, the pleaded case would be: the tweet does not bear the defamatory meaning Dr Wright claims. The notional comparison would be between a Norwegian claim which denied any defamatory meaning and a claim brought in this jurisdiction which averred precisely the converse. In my view, this would be a classic instance of "mirror image" claims the adjudication of which would lead to legally irreconcilable outcomes. I would have no difficulty in holding that Article 27 applied to this hypothetical version.
62. Imagine, on the other hand, another hypothetical version of the present case where Mr Granath expressly admitted in the Norwegian proceedings that the tweet bore the defamatory meaning averred in Dr Wright's letter before action, and relied solely on the averments set out in the Opening Writ. On these assumed facts, the Particulars of Claim in this jurisdiction would look exactly the same as they do now, save that they might plead that the innuendo meaning is not disputed.
63. In this hypothetical situation (which Mr Wolanski would point out is indistinguishable from the instant case), the centrepiece of both sets of proceedings would still be this particular tweet. Whether it was actionably defamatory in this jurisdiction would depend on whether it met the relevant common law criteria (see, for example, Warby J in *Allen v Times Newspapers Limited* [2019] EWHC 1235 (QB) at para 19) and the statutory test of "serious harm". These are matters which hinge on our domestic law, and whether or not there are Norwegian analogues would, it seems to me, be nothing to the point: the situation would be similar to the German public policy issue dismissed by Cooke J as irrelevant in the *J.P. Morgan* case. In any case, my second hypothetical version could be simplified further so as to eliminate any complications of this sort.
64. So, if the sole issue on the pleadings is the viability or otherwise of what we would call Mr Granath's *defences* – pleaded in the Opening Writ as *claims* - what then?
65. First of all, I reject Mr Wolanski's submission that the fact that Mr Granath has pleaded "defences" in Norway is dispositive of the matter. Even on the assumption that he has, because the shape of Norwegian law is the same as ours, the facts and matters on which he relies form the basis of his *claims* in that jurisdiction for NDR. It is these *claims* which have to be compared with Dr Wright's claims here. Thus, given the nature of the relief sought in Norway, these are not defences *stricto sensu* at all.
66. Secondly, I do not consider that the solution is to be found in the words in parenthesis in para 42 of Cooke J's judgment, "whether in dispute or not". This phrase must be understood in the context of the passage in which it is located. The inquiry is directed to the "basic claimed rights and obligations of the parties". Applying para 47 of Cooke J's judgment to my hypothetical facts, regard must be had to the way in which the claim is framed in Norway as well as the arguments in support of it.

67. Thirdly, it is entirely unclear whether Norwegian law possesses a structure similar to the common law of defamation read in conjunction with the Defamation Act 2013. Here, certain matters fall to be placed within the envelope of “cause of action” (in the common law sense of that term), whereas others bear the label, “defence”. Although it may reasonably be inferred that in Norway there is an obligation to set out one’s case on truth and public interest, and without doing so these issues do not arise, it is not apparent whether these are defences *stricto sensu*. They probably are, but that assessment is not sufficient.
68. Even with this uncertainty about the Norwegian substantive law of defamation, what is clear is that Mr Granath has pleaded truth and public interest as part and parcel of his claim of non-liability, and that it is neither incumbent on, nor appropriate for, Dr Wright to set out in his Particulars of Claim any facts and matters which in some way pre-empt Mr Granath’s likely defence in this jurisdiction. In this narrow sense, these parallel claims differ from those under consideration in the *Easygroup* case where the absence of consent was an ingredient of the statutory and common law causes of action in this jurisdiction, and it was therefore apparent that the issue of consent was common to both sets of proceedings, ignoring any defences.
69. It is also clear from the *Easygroup* case that the exercise in play does entail some examination of the core issues in both sets of proceedings. By “issues” I mean “what in basic terms each party is averring and claiming”; I am not seeking to break this down any further into the sort of detail deprecated by Cooke J in the *J.P. Morgan* case. But the comparison must be limited to the issues raised in Norway on the one hand (truth, public interest and no loss) and those raised in England (innuendo meaning). Is the absence of intersection or overlap critical?
70. Framed purely in terms of issue estoppel, there would be no necessary irreconcilability in terms of the possible outcomes of parallel litigation confined to these issues. Mr Granath could succeed in Norway on one or more of the averments he has set out, and Dr Wright could also succeed in England on the issue of defamatory meaning, without there being a conflict.
71. However, after careful reflection I have concluded that this is too narrow an approach. In the event that Mr Granath were to succeed in Norway either on his averment of truth or of public interest, it must follow in my judgment that any proceedings here would and should be stillborn. Even if the words complained of bore a defamatory meaning, the finding in Norway that they were true should be the end of the matter. It would be an abuse of process to contend otherwise. It is true that in the event that Mr Granath’s pleaded claims were to fail across on the board in Norway, the door would open to Dr Wright in this jurisdiction (on the hypothetical facts I am continuing to posit), and the two judgments would not be irreconcilable. However, it is the potential for irreconcilable judgments which is key.
72. In reaching this conclusion, I have noted in passing the terms of s.34 of the Civil Jurisdiction and Judgments Act 1982 (which were not drawn to my attention) and, more importantly, have also considered whether my analysis is consistent with the approach taken by David Richards LJ in the *Easygroup* case, paras 41-52 in particular. On one reading of his judgment, he was seeking to identify areas of intersection or overlap between the respective claims. It was necessary to undertake that exercise in the circumstances of the *Easygroup* case, but in my opinion the

absence of intersection or overlap is not fatal to Mr Tomlinson's submission. I have adopted a broader approach to that question.

73. In any case, even if I am wrong in my foregoing analysis, there is a second basis for finding in Mr Tomlinson's favour on this first issue. In that context, I must now proceed to consider the facts of the present case and move beyond the hypothetical facts addressed between §§62-72 above.
74. In my judgment, considerable caution continues to be required when the Opening Writ in the Oslo District Court is subjected to scrutiny by a common lawyer. Mr Granath has expressly put negligence in issue, but the precise meaning of that term in a defamation context is not clear. He has not set out his case on meaning, but I have no idea whether Norwegian rules of pleading demand this. Although my impression is that Dr Wright's case on innuendo meaning as pleaded in his Particulars of Claim is correct, I cannot say one way or the other how this issue would be approached in Norway nor can my preliminary assessment be regarded as definitive. Furthermore, the fact that Mr Thomson's witness statement is silent on these questions cannot give rise to the inference that his client would accept the pleaded innuendo meaning.
75. It follows that I can only safely proceed on the basis that the Oslo District Court will, or at least may well, be invited in due course to determine what we would call the issue of defamatory meaning, being an issue which is logically prior to those of truth and public interest. At this stage of the inquiry, Cooke J's phrase in parenthesis becomes relevant.
76. On the foregoing premise, I consider that I am confronted with a hybrid situation with the following two key features. There is an issue common to both sets of proceedings: the meaning of the tweet, and whether that meaning is defamatory. In that respect, there is clearly a "mirror image". In addition, the issues raised in Mr Granath's pleaded case in Norway are not reflected in the Particulars of Claim. In that respect, I have held that the potential for irreconcilable judgments arises, but in the event that conclusion is wrong, the focus must shift to the area of commonality.
77. The authorities do not provide a clear answer to the conundrum presented by this case. There are two logically possible approaches: (1) whether there is a significant or substantial degree of commonality or overlap between the two sets of claims, and (2) whether the matters in common, as opposed to the matters which are not in common, predominate.
78. In my judgment, the first approach is the correct one, and its application leads inevitably to the conclusion that Mr Granath must prevail on the first issue. An important relevant albeit not decisive factor is the clear potential for conflicting decisions. That potential arises in relation to the dispute as to the defamatory meaning of the tweet. The second approach I have outlined is incapable of practical application because it is not possible to quantify which issues are somehow the more weighty or important when a comparative evaluation of these different claims is made. All that it is necessary to hold is that there is a substantial and important area of common dispute on the issue of meaning whose resolution, if permitted to occur contemporaneously, would generate the potential vice of conflicting decisions. This holding follows the steer given by David Richards LJ in the passages I have considered.

79. Furthermore, the legal rule forming the basis of both sets of proceedings is the same. The true meaning of the tweet would fall to be established both in Norway and here. That different rules of domestic law may govern that exercise is an issue “on the way” and therefore irrelevant.
80. I deal, for completeness, with the contention that the “objet” of these two sets of proceedings differs. I disagree. The purpose of each set of proceedings is to establish liability or non-liability in relation to the tweet under consideration: see, in particular §31 and §36(2) above.

The Second Issue

81. The second issue is whether Dr Wright has a substantive, indefeasible right to sue in this jurisdiction regardless of Article 27 and the *lis pendens* doctrine.
82. Mr Wolanski submitted that his client does enjoy such a right, whether under the “mosaic” or the “centre of interests” approach, which right cannot be defeated by the operation of procedural provisions of the Lugano Convention.
83. He drew my attention to a trio of decisions in the CJEU which addressed the field of personality rights such as defamation, viz.: (1) *Shevill v Presse Alliance SA* (Case C-68/93) [1995] 2 AC 18, (2) *eDate Advertising GmbH v X Martinez v MGN Ltd* (Joined Cases C-509/09 & C-161/10) [2012] QB 654, and *Bolagsupplysningen OU v Svensk Handel AB* (Case C-194/16) [2018] QB 963.
84. The effect of these decisions has been accurately summarised at para 36 of Mr Wolanski’s skeleton argument. In short, there are three bases for jurisdiction for which a claimant can opt to bring an action in libel (or other personality rights) concerning publication on the internet:
- (1) the State of the defendant’s domicile, under Article 2 of the Lugano Convention (general jurisdiction), for global damages and/or non-pecuniary relief; or
 - (2) the State of the claimant’s “centre of interests” under Article 5(3) of the Lugano Convention (special jurisdiction – centre of interests), for global damages and/or non-pecuniary relief; or
 - (3) each State in which there has been publication under Article 5(3) of the Lugano Convention (special jurisdiction – “mosaic” approach), but only for damages; and limited to the damages suffered by publication in that Member State.
85. Mr Wolanski’s argument was directed to sub-paras (2) and (3) above. It is the application of Article 5(3) in these circumstances which founds the contention that there exists a substantive right which cannot, as it were, be defeated or displaced.
86. This submission may receive some support from Lewison LJ’s observations in the recent decision of the Court of Appeal in *Euroeco Fuels (Poland) Ltd v Szczecin and Swinoujscie Seaports Authority SA* [2019] EWCA Civ 1932, [2019] 4 WLR 156, where he pointed out:

“So far as the question of irreconcilable judgments is concerned, I wish to reserve my opinion for a case in which it matters. I simply make the following observations. Judgment in *The Tatry* was given on 6 December 1994. *Shevill* was argued before the Grand Chamber on 10 January 1995; and judgment was delivered on 7 March 1995. Of the 11 judges who sat in *Shevill*, 6 had also sat in *The Tatry*. Neither Advocate General Léger nor the court referred to *The Tatry*, which had been decided in the previous month. In *Shevill* both Advocates-General drew a distinction between “conflicting judgments” on the one hand, and “irreconcilable judgments” on the other. That does not appear to be the case in *The Tatry*, in which the court referred only to “conflicting judgments”. The court in *Shevill* did not cast doubt on the Advocates General’s distinction; and its answer to question 6 might be thought to recognise implicitly that the existence of another possible jurisdiction did not deprive the claimant of his right to sue. How *Shevill* and *The Tatry* are to be reconciled is not, in my judgment, a straightforward question. On one view, *Shevill* (and after it *eDate*) give a claimant the substantive right to sue in each member state where the libel has been published, with the consequence that that right is not to be taken away by procedural means. On another view, the mere fact that there is a right to begin proceedings in a particular member state does not entail the consequence that the claimant is entitled to prosecute those proceedings all the way to trial. There is something to be said for each point of view. So I would prefer not to decide between them in a case in which it makes no difference to the outcome of the appeal.”

87. However, Bean LJ giving the leading judgment in the *Euroeco* case preferred what Lewison LJ characterised as “another view”, albeit holding that it was unnecessary for his decision:

“59. I accept the submission of Mr McCormick that the judgment of the Grand Chamber of the ECJ in *Shevill* is an authority about the right of a claimant to issue claims in each jurisdiction pursuant to RBR Article 7(2) [the equivalent to Article 5(3) of the Lugano Convention], not about whether the “related actions” provisions of Article 30 can then be applied to such claims. The proposition for which Ms Page contends seems rather extreme. Suppose that someone is found stabbed to death and the defendant publishes an article, which is circulated throughout Europe, alleging that the deceased was murdered by the claimant. If Ms Page is right, the claimant, assuming he can afford it, has an absolute right to bring 27 separate libel claims against the defendant and (subject to any local case management decisions) to push each of them along towards a trial and judgment in whichever order he, the claimant, chooses. No stay can be granted, still less jurisdiction

declined, under Article 30; and if in the first trial it is found that the claimant did in fact murder the deceased then, no matter: he can try again in another Member State because there is no risk of "irreconcilable" judgments, only of "conflicting" ones. This does not seem to me to accord with common sense. It also enables a claimant with deep pockets to oppress a defendant by suing him in 27 jurisdictions."

88. Baker LJ considered that the proposition that there was an absolute right to sue was "unattractive", but having read Lewison LJ's judgment in draft he felt it unnecessary to express a concluded view on this topic.
89. Mr Tomlinson's riposte was on two levels. First, he submitted that there could be no question of an absolute right conferred by Article 5(3) in the context of Mr Granath's claim for NDR referable to any global claim: neither the "mosaic" nor the "centre of interests" principle was, therefore, in play. Secondly, he submitted that in any case the provisions of Article 5(3) cannot override Article 27.
90. I enter this discussion with a measure of trepidation. Both Mr Wolanski and Mr Tomlinson interpreted the overall tenor of Lewison LJ's observations as lending support to Mr Granath's case. That may be reading too much into them. For my part, having carefully considered paras 97-103 of the Opinion of Advocate General Darmon in *Shevill*, I do see the force of the contention that he was saying that in a situation where the "mosaic" principle is applicable (his Opinion did not address the "centre of interests" principle because *eDate* had not yet been decided) there is no risk of irreconcilable judgments. On the other hand, I do not read the judgment of the CJEU as lending unequivocal support for the Advocate General's Opinion.
91. In the absence of *Shevill* I would have been very strongly minded to rule that Articles 5(3) and 27 must be read as part and parcel of a complementary, self-contained scheme; and that the notion that the earlier provision somehow conferred a right that was indefeasible, or was capable of overriding the application of Article 27, is difficult to accept. Even so, I do not consider that it is necessary for me to express a definitive conclusion. Although the Particulars of Claim engage the "mosaic" and "centre of interests" principles, Mr Granath's claim for NDR is more broadly directed. It is a "global" claim that he is not liable for any damage suffered across the Contracting States. I do not think that it matters that Dr Wright's claim here includes a claim for non-pecuniary relief: that is very much adjunctive. I therefore hold that Dr Wright has no substantive right to sue in a situation where – as I have held – the *lis pendens* provisions of Article 27 of the Lugano Convention defeat his claim.

Disposal

92. Mr Tomlinson's submissions succeed on both issues. Mr Granath is entitled to the declaratory relief he seeks under CPR r.11(1) as well as to an order dismissing the proceedings under r.11(6).