[redacted]

From: Matthew Nicklin QC [redacted]
Sent: 09 May 2017 14:44
To: Claire Gill
Cc: Robin Bizony
Subject: RE: OneCoin [CR-PCR1.FID118821]

LEGAL ADVICE PRIVILEGE

Dear Claire,

Thank you for the instructions dated 5 May and the papers you sent down. In this email I will use OneCoin as an all-embracing term for all the OneCoin and related entities. I deal below, and specifically, with which OneCoin entity should be the Claimant in the event that legal proceedings are commenced in England & Wales.

You have asked me to deal with the matter in two stages. First, to provide answers to 3 questions identified in the instructions (and set out in italics below) and then to advice on proposed strategy at a Conference which has been fixed for this Thursday 11 May 2017.

Should proceedings against McAdam be commenced in Scotland or England & Wales, taking into account the serious harm threshold and the possibility of challenge to jurisdiction

1. I have reached the conclusion that if OneCoin intends to sue McAdam in a UK jurisdiction, then it would be best advised to do that in Scotland. I am not in a position to provide advice on the prospects of success in Scotland. My advice is premised on the difficulties that such a claim would face in England & Wales. I will explain my reasoning.

   Serious Harm

2. Unless OneCoin can demonstrate that identifiable statement(s) published by McAdam have caused provable and serious financial loss, I consider that a claim brought by OneCoin against McAdam in England & Wales would face serious (probably insuperable) difficulties.

3. s.1 Defamation Act 2013 provides that a statement is not defamatory unless it has caused or is likely to cause serious harm to the reputation of the claimant. Where the claimant is a company, such serious harm means serious financial loss. The current authorities on the proper interpretation of this section are conveniently gathered together by Warby J in ***Monroe -v- Hopkins*** **[2017] EWHC 433 (QB), [2017] 4 WLR 68** [68]-[70]. However, a Court of Appeal judgment is awaited against the first instance decision ***Lachaux -v- Independent Print Ltd & others*** **[2015] EWHC 2242 (QB), [2015] EMLR 28, [2016] 2 WLR 437**. The appeal was heard at the end of November 2016. There is no information available on when the CA will hand down judgment. Once that decision is available, the advice set out in this email may need to be reconsidered, although the decision would have to be pretty extraordinary to lead to a significant change in the view I have expressed.

4. The problem, in a nutshell, is causation. It would be submitted that OneCoin has been so comprehensively beset by seriously defamatory allegations in multiple publications in multiple jurisdictions that it would be impossible to say, as a matter of reality, that McAdam's publications had either individually or collectively caused OneCoin serious financial loss (or was likely to do so).

5. The ***Lachaux*** decision might be thought to provide some comfort for a Claimant who finds himself the subject of multiple serious libels. Warby J applied (and endorsed) the principle, established in ***Associated Newspapers Ltd v Dingle*** **[1964] AC 371**; in short, that it does not matter if the Claimant's reputation has

been damaged by other publications when assessing the damage caused by the publication sued upon (see [74]-[86]).

6. But there is a problem for corporate claimants. Although an individual's reputation can be damaged (and seriously so) by publication of grave allegations even to a relatively small scale audience, that is the limit of what a personal claimant has to prove. A corporate claimant has to go further. It has to demonstrate that the publication has caused (or is likely to cause) serious financial harm. On the facts of this case, no court in my view is going to infer that publications complained of via YouTube (even were it possible to show a substantial number of viewers of those videos in England & Wales) have caused OneCoin serious financial loss. Presented with the vast array of seriously defamatory allegations against OneCoin that are already embedded in the public domain, a Court would require actual proof that some particular serious financial loss had been caused directly by one (or more) of McAdam's publications. Absent that, it seems to me that any defamation claim against McAdam would likely fail at the s.1 hurdle.

7. As s.1 Defamation Act 2013 does not apply to Scotland (s.17(2)), there would appear to be a clear advantage to OneCoin bringing any defamation proceedings it wants to commence against McAdam in Scotland. Subject to advice being received on this point from Scottish lawyers, it would appear to me that a claim in Scotland would be governed by the common law rules as to what is defamatory. McAdam's statements are clearly defamatory applying the common law test.

Jurisdiction

8. I do not consider that there would have been any problem with jurisdiction affecting a claim being brought in England & Wales.

9. I assume for these purposes that it would be possible to show that the various YouTube videos have been watched by a significant number of people in England & Wales. There would be problems for any claim if the relevant publications had been watched by, say, 100 or fewer people. There is no precision in this number, but a publication to fewer than 100 people will present a risk that the Court will be asked to dispose of any claim on the basis that prosecution of it would be disproportionate to any identifiable benefit to the Claimant (under the principle of ***Jameel -v- Dow Jones & Co Inc*** **[2005] EWCA Civ 75, [2005] EMLR 353, [2005] QB 946**).

10. Once a substantial publication is shown in England & Wales, the Court here has jurisdiction over the claim. McAdam appears to be domiciled in Scotland. Proceedings can be served on her in Scotland without requiring permission of the Court (CPR Part 6.32). s.9 Defamation Act 2013 does not apply because McAdam is domiciled in the United Kingdom (s.9(1)(a)). There remains a jurisdiction for the Courts in England & Wales to stay a claim brought there on the basis that the more appropriate forum is Scotland - see ***Lennon -v- Scottish Daily Record*** **[2004] EMLR 18** following ***Cumming -v- Scottish Daily Record*** **[1995] EMLR 538** and as explained in *Gatley* §24.31).

11. Whether the Court would stay proceedings under the *forum non conveniens* principle in favour of Scotland would be determined, almost inevitably, on the basis of the numbers of publishees in each jurisdiction. There is no connection between the subject matter of the libel and Scotland. So if there is a greater publication in England & Wales, the Court would likely refuse an application to stay the claim in favour of Scotland.

12. I do not know whether the Scottish Courts would apply a *forum non conveniens* principle to stay a libel claim brought in Scotland on the basis that England & Wales is the more appropriate forum. Separate advice will be required from Scottish lawyers on this point if it needs to be considered further.

Who ought to sue?

13. The relatively simple answer to this question is to ask: who would the publishees understand as the target of the defamatory comments made by McAdam? Given OneCoin's global presence, that answer might vary

between individual publishee and in each jurisdiction where the comments were read. Conceivably, the remarks could be understood to refer to all of the OneCoin entities.

14. However, in relation to any claim to be brought in England & Wales, the critical additional question is which company would suffer the financial loss that, as OneCoin would contend, was (or was likely to be) caused by McAdam's publications. I am not well-placed to answer that question definitively as I only have an overview of the corporate structure, but it would seem likely that the company that would suffer the loss would be OneCoin Ltd, registered in the UAE. If serious financial loss can be established to have been caused by McAdam's publication(s), then (absent some extraordinary factor) the claimant should be the company that suffered that loss.

15. I briefly discussed with you on the telephone last week as to whether Dr Ruja Ignatova ought to be a claimant personally. It might be possible to construct a claim on the basis that there will be publishees who will have considered that, given her prominent role in OneCoin, Dr Ignatova must be involved in the alleged criminal enterprise. However, I am not convinced that such a claim would meet OneCoin's objectives as I currently understand them. There is also, I understand, an issue arising from a conviction of Dr Ignatova for fraud in Germany. Although not determinative of any libel claim she might bring, that conviction, if correct, would tend to weigh against Dr Ignatova issuing any proceedings in her own name.

Would it, at this stage, be possible to make an application to obtain a full copy of the recording McAdam made of her telephone conversation with DC Vaughan of the City of London Police

16. Any application would probably have to be made under the *Norwich Pharmacal* jurisdiction. There is a way of marshalling a claim to try and get Pre-Action Disclosure of the recording, but it runs the risk of looking contrived and being refused.

Pre-Action Disclosure

17. An application for pre-action disclosure under CPR Part 31.16 would not succeed. It would fail because OneCoin would not be able to demonstrate that "if proceedings had started, [McAdam]'s duty by way of standard disclosure... would extend to the document ... of which [OneCoin] seeks disclosure" under CPR 31.16(3)(c). I cannot see how the, unpublished balance, of the recording of the telephone call between the officer and McAdam would be likely to be discloseable under CPR 31.6. OneCoin does not need it to plead a claim against McAdam; what she published is clear enough. The fact of the call or its contents would go to no issue in the libel proceedings against McAdam (the repetition rule would prevent her relying upon it as any part of a justification defence).

18. I would expect the Court to dispose of any application on that simple ground, but there are other issues that would likely be raised by McAdam under 31.16(3)(d) and the Court's discretion generally. I can see a Master being wary of ordering disclosure the target of which is an officer carrying out an ongoing investigation. The Court would likely rule that the application for disclosure was premature and that the correct course would be to wait and see whether proceedings were issued and whether the recording fell to be disclosed in the proceedings once the issues were known.

19. I have considered whether an application under CPR 31.6 could be framed on the basis that the ultimate claim would be brought against **both** McAdam and Vaughan (CoLP). Such a claim would not be straightforward and here I do not address the merits of such a claim or defences that might be available.

20. It would require a case to be formulated against Vaughan that he slandered OneCoin in the telephone conversation and is thereafter liable for the consequent republication (under ***Slipper***) by McAdam via YouTube. McAdam would be a primary tortfeasor for the alleged libel via YouTube (assuming that we can demonstrate that she is responsible for the recording being posted on YouTube).

21. The problem I can foresee with that is that Vaughan would have good prospects of arguing that he could not have (nor could a reasonable person have) foreseen that McAdam would publish details (and extracts) from the call on YouTube. Under ***McManus -v- Beckham*** **[2002] EWCA Civ 939; [2002] 1 WLR 2982** [34], [43],

such an argument would likely succeed, but would only affect the republication case against Vaughan. In an action where McAdam and Vaughan are both defendants, the recording held by McAdam would be discloseable under 31.6 in relation to the issue of what words were spoken and published by Vaughan to McAdam (they would support OneCoin's case against Vaughan - CPR 31.6(b)(iii). The application might yet nevertheless be refused on a discretionary basis. A court might be suspicious of what might look like a contrived case.

Norwich Pharmacal

22. Such a claim would be self-standing, and would not commit OneCoin to launching any proceedings. It would be issued against McAdam on the basis that she has a recording of statements made by DC Vaughan which are defamatory of OneCoin and OneCoin wants to obtain the full call in order to be able to decide whether to sue DC Vaughan for both the publication to McAdam and the resulting publication of parts of the call and further description of it by McAdam on the YouTube video. That is a perfectly sound basis on which to engage the *Norwich Pharmacal* principle; it would be difficult given the evidence to characterise this as fishing.

23. The factors that must be shown in order for the Court to grant an order for disclosure are set out, conveniently, in *Gatley* §31.4:

(a) an arguable wrong must have been carried out against OneCoin by DC Vaughan; this would be satisfied;

(b) McAdam must (i) be mixed up in the arguable wrongdoing; and (ii) be able to provide information which would enable the applicant to take action against the alleged wrongdoer; McAdam might try to argue that she is a 'mere witness', but I think a Court would consider that she was sufficiently caught up in the wrongdoing to justify the making of an order

(c) there must be a need for an order to enable action to be brought against the alleged wrongdoer, although the action need not be legal proceedings in respect of the arguable wrong and OneCoin must genuinely intend to try and seek redress for the arguable wrong; here OneCoin has the option of libel/slander proceedings against DC Vaughan (and/or CoLP)) or even a complaint to CoLP (IPCC) about the conduct of DC Vaughan, particularly given the extensive publicity given to his remarks in the YouTube video.

(d) an order will only be granted if it is proportionate to do so in all the circumstances, having particular regard to the privacy and data protection rights of the alleged wrongdoers and the terms of the order sough, although the test of necessity does not require the remedy to be one of last resort; I think OneCoin would have good arguments to support this. Without the order they would be hobbled in their ability to take proceedings or complain against DC Vaughan. DC Vaughan's privacy rights would be of very low order given that he was acting as a police officer when he spoke to McAdam.

(e) discretionary factors favour granting (or refusing) disclosure; although it has less weight, I would still be cautious as to the risk that an application could be refused on a discretionary basis (possibly on the basis of the ongoing police investigation) but it carries less weight in a *Norwich Pharmacal* application where the target is the officer. It would be a bold decision, if the Judge had decided (a) to (d) in OneCoin's favour then to refuse relief on a discretionary basis.

24. I hope the above sufficiently answers the points I have been asked initially to address. I can expand more as required either before or at the Conference on Thursday

Best wishes,

Matthew

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