



Neutral Citation Number: [2018] EWHC 1125 (QB)

Case No: ATC 17/0035

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2018

Before:

MR JUSTICE SPENCER

Between :

Sir David Rowat Barclay
- and -
Craig Leslie Tuck
(calling himself Lord De Chanson)

Claimant

Defendant

Sandip Patel QC (instructed by Lexavoca) for the Claimant
Terence Wong (instructed by Cartwright King) for the Defendant

Hearing dates: 16th, 17th and 18th April 2018

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 Spencer:

Introduction and overview

1. This is an application to commit the defendant to prison for contempt of court for breach of orders made by Turner J on 14th December 2016 and 28th March 2017 to enforce an order made against the defendant in the French courts on 15th January 2016. The French judgment required the defendant to withdraw pages accessible at seven of his URL addresses on the internet which were found to constitute mental harassment of the claimant. The order made by Turner J on 14th December 2016 (“the First Order”) required the defendant to withdraw forthwith the webpages accessible at these seven URL addresses. The order made by Turner J on 28th March 2017 (“the Second Order”) was made at the initial hearing of the application to commit the defendant for breach of the First Order. The defendant appeared in person. The application for committal was adjourned on terms which, in effect, gave the defendant the opportunity of complying with the First Order by taking specified steps in an agreed timetable.
2. The claimant’s case is that the defendant remains in breach of the First Order, and is also in breach of the Second Order. The application initially came on for hearing before Cheema-Grubb J on 5th March 2018, during the course of which the defendant obtained the prospect of legal representation. The matter was therefore adjourned, and directions were given. I heard the application for committal in full on 16th, 17th and 18th April 2018. The defendant was represented by counsel, Mr Terence Wong. The claimant was represented by Mr Sandip Patel QC. I reserved judgment.

Factual background

3. The claimant, Sir David Barclay, and his twin brother Sir Frederick Barclay, are well known public figures. They have a home on the island of Brecqhou, in the Channel Islands. For a time the defendant also lived in the Channel Islands, on the island of Sark. Over a period of several years the defendant has been researching and writing an unauthorised biography of the claimant and his brother. He does not like them. The nature of the proposed biography, and other writings of the defendant, is an exposé of what the defendant alleges to be their discreditable background and conduct.
4. The defendant has for a long time written extensively about these matters in postings on the internet, at various URL addresses. Since at least 2010 there have been exchanges of correspondence between the defendant and lawyers representing the Barclay brothers. In 2014 their French lawyers wrote to the defendant requiring him to withdraw or deny access to various webpages at his URL addresses which contained particularly offensive and injurious material, failing which appropriate proceedings (criminal and civil) would be commenced in the French courts. The defendant declined to remove the offending material.
5. Proceedings were commenced in the Paris High Court, criminal and civil, in which judgment was given on 15th January 2016. The defendant was charged under Article 222-33-2-2 of the French Penal Code with the crime of mental harassment through public online communication in relation to the seven URL addresses. In the

concurrent civil action the claimant sought the prohibition of “continued dissemination in their current state of the pages accessible at URL addresses[listed]” (i.e. the seven addresses in question), in that they constituted mental harassment. The claimant also claimed damages, and an order requiring the withdrawal of the webpages in question.

6. The relevant provisions of the French Penal Code came into force on 4th August 2014 and create the offence of:

“...harassing an individual by repeated comments or conduct having the purpose or effect of a deterioration in his living conditions reflected by an alteration in his physical or mental health...”

When committed by the use of a public online communication service, or when committed on an individual whose special vulnerability, due to his age, an illness, an infirmity, or a physical or psychological disability, is apparent or known to their author, the offence is punishable by 2 years’ imprisonment and a fine of €30,000.

7. The recurring themes found by the French court to have been published in the articles at the webpages in question were: accusations of tax fraud, suspicions of corruption, comments aimed at the claimant’s physical characteristics and those of his family, innuendo regarding his sexual orientation, dealings with individuals having committed serious offences, problems with public and social policy in the territories of Sark and Brecquou, surveillance put in place against the defendant, and multiplication of delaying legal proceedings.
8. There was medical evidence that the repetition of this behaviour was affecting and unsettling the claimant so that he had developed a reactive anxio-depressive syndrome. The court found that the claimant, who was aged 79-80 years at the relevant time, was a vulnerable individual.
9. The court found the defendant guilty of the acts alleged. For the crime he was fined €1,500. For the civil claim he was ordered to pay compensation of €700 for mental harm. He was ordered to pay €1,000 costs
10. As to the URL webpages, the French judgment reads:

“With regard to the withdrawal of the contentious blogs: Whereas, given the declaration of guilt and the maintenance of the contentious blogs which continue to produce the same effects referred to above, Craig Leslie Tuck calling himself Lord De Chanson it is ordered, under penalty of €100 per day of delay, after a period of eight days with effect from notification of this Judgement, to withdraw the pages accessible at the following URL addresses [the seven URL addresses were listed]. The plaintiff may also go to the Civil Court to quantify the penalty at the relevant date.”

11. On 30th June 2016 the claimant’s solicitors wrote to the defendant requiring him to pay the sums awarded by the French court and to “take down the offending blogs”,

failing which application would be made to the English court for enforcement of the judgment. He was informed that if thereafter he still continued to fail to take down the blogs, there would be proceedings for contempt of court which could result in his imprisonment. He was advised to consult a solicitor

12. On 20th October 2016 the claimant’s solicitors wrote to the defendant giving him final notice that if he did not comply with the judgment, proceedings would be issued to enforce the French judgment by a mandatory injunction.
13. That application was duly made under Regulation (EU) No.1215/2012 (“Recast Brussels Regulation”) pursuant to CPR 74.4A, 74.9 and Practice Direction 74A paragraphs 4 and 6A. Turner J made the order on 14th December 2016. The operative paragraph provided:

“(1) following the judgment reference No 15083000221 of the Court in Paris of the 15th January 2016 the Defendant must withdraw forthwith the webpages accessible at the URL addresses:

- (i) www.lorddechanson.wordpress.com;
- (ii) www.sirfrederickbarclaywitnessstatement@wordpress.com;
- (iii) www.derekquinlanfinancier@wordpress.com;
- (iv) www.aidanbarclayamendedwitnessstatement@wordpress.com;
- (v) www.thebarclaybrothersandaidanbarclay@wordpress.com;
- (vi) www.sarkandbrecqhou@wordpress.com ; and
- (vii) www.thebarclaybrotherspressrelease@wordpress.com”

The defendant was ordered to pay the costs of the application. The order was headed with a penal notice.

14. When he was served with the order the defendant applied to set it aside. That application was dismissed by Soole J on 29th December 2016.
15. Before that the defendant had written to WordPress on 20th December 2016 saying that he wanted to change some of the content of several specified blogs but did not want them removed. The blogs he listed included (vi) and (vii). They did not include (ii)-(v). He said he had lost the passwords to all the blog addresses he listed and asked for advice on how to access them. The advice given by WordPress included the suggestion that he provide them with the e-mail address on file for the account in respect of each of the separate blogs.
16. On 22nd December 2016 the defendant wrote to WordPress to say that he had the e-mail addresses, but because some of his files were missing he could not identify which e-mail applied to each blog. He said he had the passwords to his e-mail accounts and invited WordPress to e-mail the correct password for each blog to his individual e-mail accounts. There was further e-mail correspondence with WordPress along the same lines.

17. On 24th December 2016 the defendant wrote to WordPress listing the e-mail accounts he could locate, explaining that the sheet of paper “with correspondence to the blogs” had gone missing. He said again he did not want his blog to be deleted, “I just want to amend the editorial content to comply with the court order”.
18. On 26th January 2017 the claimant’s solicitors issued an application for the defendant’s committal for breach of the order to withdraw the web pages at the seven URL addresses. In the supporting affidavit it was said that those at (i)-(v) had been modified but still remained offensive. Those at (vi)-(vii) remained unchanged.
19. The application was first listed on 15th February 2017 before William Davis J. The defendant was unrepresented. He arrived at court with a large volume of documents. The matter was adjourned for him to serve a witness statement in accordance with the Civil Procedure Rules, and listed for hearing on 28th March 2017.
20. The gist of what the defendant was asserting, in the witness statements and documents he served, was that he could not comply with the order in respect of blogs (vi) and (vii) because he could not access them. He was saying that he had modified the blogs at (i), (ii), (iii) and (v) so as to comply with the court order.
21. The claimant’s solicitors instructed an expert witness, Mr Jason Coyne, to give his opinion on the technical issues and on the question of whether the defendant was truly unable to access the blogs at (vi) and (vii).
22. The committal application came on for hearing before Turner J on 28th March 2017. The defendant was still unrepresented. There is no transcript of that hearing, and there is some dispute as to precisely what was said. In essence, however, the defendant explained to the judge that he was unable to access the blogs at (vi) and (vii) because he did not have the relevant passwords and/or e-mail addresses. He told the judge that he had modified the blog at (i) and everything that was on it was true. According to the recollection of the claimant’s solicitor Mr Khindria (who gave evidence before me) the defendant was very contrite. He said he did not want to be offensive. He was prepared to change the blog to take out offensive material. The claimant’s IT expert, Mr Coyne, was present at court. The judge suggested that Mr Coyne and the defendant sit down together with a view to accessing the blogs at (vi) and (vii), with Mr Coyne’s technical assistance. An hour or two was spent in that endeavour, to no avail. The outcome of the hearing was that the application was adjourned, without a fixed date, but with further orders made in relation to each of the seven blogs.
23. The relevant provisions of the Second Order (with the URL addresses abbreviated) were as follows:

“1. The defendant shall use his best efforts to procure the deactivation of web blogs at URL addresses:

[(vi)] (“A”)

[(vii)] (“B”)

2. The defendant shall by 4.30pm 11 April 2017 provide to the claimant, and/or any person identified by the defendant to the

claimant by 7 April 2017, information including e-mail addresses, passwords, phrases, codes, numbers, password reset questions and the corresponding answers, or other forms of identification that may be used to procure the deactivation of A and B.

3. The defendant shall on written request made on behalf of the claimant and within two working days thereon provide to the claimant, and/or any person identified by the defendant to the claimant within such request, written consent authorising the claimant and/or any such person to act for or on behalf of the defendant to procure the deactivation of A and B.

4. The defendant shall by 4.30pm 4 April 2017 procure the deactivation of his web blogs at the URL addresses [(ii), (iii), (iv) and (v)].

5. The defendant shall on written request and within two working days thereon provide to the claimant a written response to proposed excisions to content on a web blog at URL address [(i)].”

24. The application was reserved to Mr Justice Turner. Costs were reserved. There was no penal notice on this order. It took several weeks for the final form of the order to be approved. The date of the sealed order was 24th April 2017.

Summary of live issues

25. Pausing there to take stock and identify the live issues in the application before me, the position is as follows.

26. In respect of URL addresses (vi) and (vii):

(a) the defendant was required by the First Order to withdraw the web pages forthwith. However, by the Second Order he was required to use his best efforts to procure the deactivation of those “web blogs”. His case is that although he has not succeeded in procuring their deactivation, he has used his best efforts to do so. I shall trace, in due course, the steps he has taken. Suffice it to say the present position is that the URL addresses in question have now been set by WordPress to “private view” mode, so they are not generally accessible.

(b) The defendant continues to maintain that he cannot find the necessary passwords and/or e-mail addresses to achieve the complete deactivation of (vi) and (vii). The claimant’s case is that he is lying in suggesting that he does not know the passwords and/or e-mail addresses which would enable him to deactivate (vi) and (vii). The claimant contends that for that reason the defendant is also in breach of paragraph 3 of the Second Order which required him to provide that information to the claimant by 11th April 2017. The claimant’s case is that, in any event, the defendant has not used his best efforts to procure the deactivation of (vi) and (vii).

(c) The claimant also contends that the defendant is in breach of the First Order in failing to withdraw forthwith the web pages accessible at the URL addresses (vi) and (vii).

(d) It is common ground that the defendant has complied with paragraph 3 of the Second Order in providing written consent authorising the claimant, or his nominee, to act on the defendant's behalf to procure the deactivation of (vi) and (vii). As I shall explain in due course, the defendant authorised both the claimant's solicitors and the claimant's expert Mr Coyne to act on his behalf.

27. In relation to the URL addresses (ii)-(v) in the First Order it is common ground that on or about 31st March 2017, in accordance with paragraph 4 of the Second Order, the Defendant did succeed in procuring the deactivation of those "web blogs". They remain disabled.
28. The other main area of contention relates to the web blog at (i). Paragraph 5 of the Second Order required that the defendant provide "a written response to proposed excisions to the content of (v) on written request". On 10th April 2017 the claimant's solicitors wrote to the defendant enclosing a copy of his then current "blog" at (i), indicating their proposed excisions by striking out in manuscript the words complained of. The defendant did respond in writing, the same day, to the proposed excisions. He simply said he was not prepared to make any further change. His case is that he is not in breach of paragraph 5 because he did provide a written response, albeit not a response which satisfied the claimant. The claimant's case is that paragraph 5 must be given a "purposive" construction, and that the defendant's blanket refusal to accept any of the proposed excisions amounted to a breach of the Order.
29. Perhaps the most contentious, and certainly the most difficult issue is the continuing status, if any, of the original requirement in the First Order that the defendant "withdraw forthwith the webpage accessible at" the URL address (i). The defendant's case is that the provisions of the Second Order in effect varied the terms of the First Order and supersede it, so that it can no longer be enforced. In other words, the sum total of the defendant's remaining obligation in relation to web blog (i), after 28th March 2017, was to comply with paragraph 5 of the Second Order by providing a written response to proposed excisions, and he has done so. Alternatively, and in any event, the defendant's case is that by radically reducing and revising the content of the blog at (i), soon after the First Order was made, the defendant complied with the obligation to "withdraw forthwith the webpage accessible at" that URL address. At the time the order was made, that blog contained material running to 79 pages (when printed out). By the time of the claimant's proposed excisions, the content of the blog had been reduced very substantially, to no more than 8 pages. As of 12th April 2018, shortly before the hearing, that unexcised content remained unchanged.
30. The claimant's case is that the requirement in the First Order to withdraw forthwith the webpage accessible at URL address (i) remains enforceable, and the defendant is still in breach of that requirement. The obligation was to withdraw the web page as a whole. Modification of the content of the web page is not sufficient. In any event, the subsequent versions, and the current version, still contain some of the offensive material which was included in the original version when the French order was made and the mandatory injunction to enforce it was granted by Turner J.

Events since the hearing on 28th March 2017

31. Because one of the principal issues is whether the defendant has used his “best efforts” to deactivate blogs (vi) and (vii) in accordance with paragraph 1 of the Second Order made on 28th March 2017, it is necessary to set out the subsequent history in some detail.
32. On 31st March 2017 the defendant took down permanently and thereby “deactivated” and “withdrew” the four webpages or blogs at URL addresses (ii)-(v).
33. On 3rd April 2017 the defendant wrote to Mr Matthew Munnenweg, chief executive of WordPress, requesting the permanent deactivation of a number of his blogs, including (vi) and (vii), apparently those he had previously asked to be deactivated in his e-mail dated 20th December 2016. He referred to a previous letter dated 7th February 2017 in which he had made the same request. As the circumstances in which he found himself unable to access these blogs are highly contentious, it is appropriate to set out his account in each of those letters.
34. In the letter dated 7th February 2017 he wrote:

“ My passwords to my 7 blogs listed below were in the same file as my e-mail addresses. The file was placed on the bottom shelf of my sideboard in my flat. When I moved back to the UK and un-packed, I noticed the file was missing. Either they got lost in transit or the file was stolen.”
35. In the letter dated 3rd April 2017 he wrote:

“As I have informed you earlier, I do not have in my possession or remember the e-mail addresses that I used to register the above blogs, neither do I have the passwords to each blog or the passwords to e-mail addresses I used. The passwords, e-mail addresses and the passwords to the e-mail addresses were in one file, which has mysteriously vanished from my former Sark domiciled residency and as such I am unable to fully comply with a High Court Enforcement Order...”
36. In the letter dated 3rd April 2017 the defendant explained his position in relation to URL (i):

“The only blog “I wish to retain” is my domain name blog ‘lorddechanson@wordpress.com [(i)]’ which will remain live to inform the public of my research and writing of the unauthorised biography of The Barclay Brothers “Tax what Tax” and to publish segments in the “public interest” from my research and to redress with a measured response to what Sir David Barclay had me subjected to for nearly a decade and what he had written about me by Kevin Delaney, who was until recently a company director of Sir David Barclay’s own companies and who is currently under police investigation for harassment and who “fronts” the Sark Newsletter and the Sark

Newspaper, which publishes nothing less than systematic defamation and character assassination upon others and carries the Barclay brothers political and economic editorial line on Sark.”

An identical letter dated 3rd April 2017 was sent to the legal department of WordPress.

37. On 3rd April 2017 the defendant wrote to the claimant’s solicitors enclosing copies of the letters he had sent to WordPress. He formally authorised the claimant’s solicitors to instruct WordPress to delete the seven blogs referred to in his letters of 3rd April, including (vi) and (vii). He wrote:

“I have spent the last three days going through every file and piece of paper in my possession to ascertain if any sheet of paper from the missing file removed from my former domiciled residency on Sark, which may contain information that would enable me to retrieve the passwords and/or email addresses to my blogs. Unfortunately nothing was found.... I confirm again I did not hold the passwords to the two blogs listed below or the corresponding e-mail addresses and the passwords to those e-mail addresses, which were in the same missing file and I can’t remember the individual e-mail addresses used with each blog.”

He invited Mr Coyne, the IT expert, and the claimant’s solicitors, to put forward any other “credible suggestions” to “help facilitate” the permanent deletion of blogs (vi) and (vii).

38. On 10th April 2017 the claimant’s solicitors wrote to the defendant expressing concern at the content and tone of his letters dated 3rd April 2017 to WordPress, certain passages of which (it was suggested) were not conducive to achieving the outcome sought by the order, and did not constitute “best efforts”. Rather, it was said, they might be counter-productive. In the passages in question the defendant had enquired of WordPress what the current position was with regard to the action taken in the French courts by the claimant and his brother against WordPress (in the form of the parent company Automattic Inc). He asked whether the delay in deactivating his blogs had anything to do with the pending litigation in Paris. There was indeed litigation pending. The Paris Court of Appeal had refused to entertain jurisdiction in relation to the claimant’s action against Automattic Inc, a U.S. corporation. That decision was appealed to the Cour de Cassation which finally gave judgment as recently as 6th March 2018, upholding the decision to decline jurisdiction.
39. In the same letter of 10th April 2017 the claimant’s solicitors sent to the defendant their proposed excisions from the web blog at URL address (i), with the request: “Please confirm that these items will be deleted”.
40. The content of the “blog” or “webpage” at URL (i), even without the proposed excisions, was now radically different from what it had been when the French court ordered its withdrawal, and when the First Order was made by Turner J. Previously it contained 79 pages (when printed out) densely packed with text and images covering

a wide range of allegations against the claimant and his brother, and many others. The revised content, of which some limited excision was requested, was more in the nature of an announcement of the forthcoming appearance of the defendant's unauthorised biography of the Barclay brothers, and an appeal for donations and for any further information of interest which readers might be able to provide. The content included a brief (and one-sided) summary of the history of the present proceedings. The parts which the claimant sought to excise included references to police investigations relating to persons connected to the Barclay brothers, in the Channel Islands and in England, with the suggestion that influence had been brought to bear to "shelve" those investigations.

41. The defendant's immediate response to the request for excision, by letter to the claimant's solicitor the same date, 10th April 2017, was:

"In relation to your final request, there is nothing that is not true on my domain blog:[(i)]. What I was subjected to on Sark was "criminal", perverse and unacceptable and in addition, my once affluent livelihood was destroyed as was my character systematically. I have no intention of deleting anything from this blog, because it is true."

42. The defendant did, however, make the suggestion in the same letter that the claimant's solicitors could construct a draft letter for him to send to WordPress and Automattic Inc, if they thought it might have more success than his own letters in achieving a result.

43. The claimant's solicitors took up that offer. On 25th April 2017 they forwarded a draft letter to the defendant, including the following passage, based solely on what the defendant was asserting rather than with any acceptance of its truth:

"I have now completely deleted the sites [(ii)-(v)] inclusive above. However I cannot recall any of the credential information required for me to access your platform to take down the material hosted at the sites [(vi) and (vii)] above."

The letter authorised Mr Coyne, the IT expert, to assist in complying with the order and ended with the request:

"Could you please either take down the websites listed at the two URLs [vi] and [vii] above or alternatively provide Mr Coyne and myself with the placement credentials to enable us to complete the task?"

The defendant, I am satisfied, sent those letters to WordPress in substantially the form of the drafts. He added a passage at the end of the draft, to which the claimant's solicitor, Mr Khindria, took no exception, which included the following:

"The only website to remain live and in my "lord De Chanson's" full control and in my sole possession is [(i)], where the orders made by the Honourable Mr Justice Turner except (sic)."

Those letters were sent in hard copy to WordPress in San Francisco, and e-mailed as well.

44. The letter was also copied to the IT expert, Mr Coyne. He had already communicated directly with WordPress, corresponding (as did the defendant) with someone giving the name “Sal P”, described as “Community Guardian”. In response to Mr Coyne’s enquiry whether WordPress could act on the court order directly, Sal P replied on 14th April 2017:

“We have received your order, which appears to have been issued by a court outside of the US. WordPress.com is located in the United States. Per our policies, we will respond only in compliance with US law and in reply to valid US-issued legal process or orders. Please resubmit your request to legal@wordpress.com once you have obtained the proper documentation. Alternatively, if the owner of the blogs is unable to access their WordPress.com account(s), they may follow the steps here to regain access... ” (a link was provided).

45. Mr Coyne replied to Sal that the defendant had forgotten his user name and his e-mail address and, because he did not have access to his e-mail, he could not retrieve his activation URL. He requested that Sal release the e-mail address the defendant used to register for the account, which might allow him to recover his e-mail account from his service provider and apply for a password reset. The reply from WordPress, once again, was that a user’s e-mail address is considered to be private information and the policy is not to give out such information without a U.S. court order or subpoena.
46. On 15th May 2017 the defendant wrote to the claimant’s solicitors suggesting that there needed to be a change of strategy to get the blogs removed, and that this was unlikely to happen whilst litigation was still pending between the Barclay brothers and Automattic Inc.
47. In view of the impasse, Mr Khindria wrote himself to WordPress on 25th May 2017 in rather more forthright terms. He enclosed the letters the defendant had sent to WordPress dated 26th April 2017 and 29th December 2016, seeking confirmation that they had been received. He also enclosed the recent correspondence between WordPress and Mr Coyne. He wrote:

“With respect to the two URLs above [(vi) and (vii)] it would seem that Mr Lord De Chanson is willing to remove the web pages accessible at the two URLs and as this is a request from the owner of the URLs you should be able to remove the web pages accessible at the two URLs or disclose the relevant information without needing any court orders. We are trying to solve this issue in an amicable manner and hope that you will cooperate.”

Mr Khindria set out the terms of the First Order including the warning that it is a contempt of court for any person notified of the order knowingly to assist in or permit a

breach of the order, and that any person doing so may be sent to prison, fined or have his assets seized. Mr Khindria's letter concluded:

“With respect to these two URLs, and without prejudice to any other claims of our client, if this request is not dealt with in a timely and complete manner, our client has instructed us to make the relevant applications for the imprisonment of Mr Lord De Chanson and/or the relevant persons within your company for contempt of court without further notice to you...”

48. On 26th May 2017 Sal P replied to the claimant's solicitors, saying that WordPress had received and reviewed the correspondence they had been sent, but advising:

“We do not remove content from WordPress.com sites unless it is in violation of our Terms of Service or a valid DMCA notice. If you have a formal US court order (including a court's decision regarding this particular content) please provide it for our review.”

49. The reference to a DMCA notice relates to the U.S. Digital Millennium Copyright Act. The explanatory notes sent to the claimant's solicitors by WordPress begin with the following summary:

“If you believe that material available on our sites, including those hosted at WordPress.com, infringes on your copyright(s), please notify us by providing a DMCA notice. Upon receipt of a valid and complete notice, we will remove the material and make a good faith attempt to contact the user who uploaded the material by e-mail. ... Please be advised that you may be liable for damages (including costs and attorneys' fees) if you materially misrepresent that material or activity is infringing. We have and will highlight such abuses and seek to collect those damages. Your DMCA notice will be forwarded to the party that made the material available, and also may be sent to third parties such as LumenDatabase.org. A note will also be placed on the site in question detailing the name of the copyright holder who submitted the takedown notice. ...”

50. Plainly the objective of the DMCA procedure is to protect and give a remedy to those whose copyright has been infringed by the inclusion of such material on someone else's website. That was not the situation here.

51. On 21st June 2017 the claimant's solicitors wrote to the defendant making it clear that it was not their responsibility to help him comply with the order. However, to help him “from a technical perspective”, they suggested the possibility of serving a DMCA notice, as mentioned by Sal P in his e-mail of 26th May 2017. They drew the defendant's attention to an automated DMCA notice form provided by Automattic Inc on their website. The letter stressed that the claimant's solicitors had no knowledge of American law and were not providing any advice, but:

“ ...It would seem from WordPress’s reply that they are willing to entertain such a request through a valid DMCA notice. You may seek your own legal advice on these matters and we are providing the above only by way of information.”

52. With the letter the solicitors enclosed a copy of the notice downloaded from the website. Among the declarations that the applicant would have to make were the following:

“I have a good faith belief that use of the copyrighted materials described above as allegedly infringing is not authorized by the copyright owner, its agent, or the law...

I swear, under penalty of perjury, that the information in the notification is accurate and that I am the copyright owner or am authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.”

53. On 26th June 2017 the defendant responded to the suggestion of a DMCA notice saying that, at this point, it was “not an avenue I wish to go down”. He expressed the view that the suggestion had nothing to do with the removal of his blogs, because there had been no abuse of copyright. He was concerned that this was an attempt by the claimant to have him “blacklisted” by WordPress and any other blog host, to restrict him from publishing segments of his unauthorised biography of the Barclay brothers. Nevertheless, he had sent an e-mail to WordPress for further clarification of the DMCA notice and its implications.
54. That same day, 26th June, he had indeed e-mailed WordPress, voicing his suspicions about the motives for the claimant’s suggestion of a DMCA notice, and seeking their advice. He repeated the request for the deactivation of URL addresses (vi) and (vii), asking that they make an exception in his case from their company policy. The response from Sal P at WordPress was that they were not in a position to give legal advice on the impact of a DMCA notice.
55. No further progress having been made, on 28th September 2017 the claimant’s solicitors informed the defendant that, as he had not complied with the First Order and the Second Order, their instructions were to pursue the application for his committal to prison. They enquired about his availability for a hearing at the beginning of November 2017.
56. On 2nd October 2017 the defendant responded to this letter, setting out at great length his complaints that the proposed committal application was oppressive. He asserted that he had acted with transparency throughout and co-operated fully with the claimant’s solicitors and Mr Coyne, to the best of his ability. A hearing date for 2nd November 2017 was obtained.
57. In the meantime the defendant wrote to Google and to Yahoo on 3rd October 2017 requesting that his blogs at (vi) and (vii) be removed from their search results.
58. On 1st November 2017, the day before the committal application was listed for trial, there was a hearing before Turner J. The defendant was still seeking representation,

and the documentation was incomplete. Directions were given. In particular there was a direction that the claimant should file and serve a consolidated committal application, incorporating the alleged breaches of both orders. The case was adjourned to the first convenient available date in 2018, with a time estimate of 2 days. Costs were reserved.

59. The consolidated committal application was issued on 13th November 2017.
60. Meanwhile the defendant continued with his attempts to persuade Google and Yahoo to remove his blogs from their search engines. The response from Yahoo, dated 7th November 2017, was that they were “unable to identify a compelling legal basis for removal” and had “therefore determined not to remove the relevant content”.
61. The defendant had more success with Google, following further correspondence with various departments of the company. On 21st November 2017 Google e-mailed the defendant:

“It is Google’s practice to voluntarily remove content pursuant to a court order directed at a third party, when appropriate. In accordance with this practice, the following URLs will be removed shortly from Google’s search results for The United Kingdom: [(vi) and (vii)] ”
62. On 6th January 2018 the defendant wrote again to Yahoo, informing them that Google had removed the blogs at (vi) and (vii) and asking again that Yahoo do the same. He also wrote in similar terms to Microsoft UK, requesting that the two blogs (vi) and (vii) be removed from the search engines Bing Search and MSN.
63. On 9th January 2018 he wrote again to Sal P at WordPress, seeking further information about the French proceedings between the Barclay brothers and WordPress, because he believed it was affecting the potential removal of blogs (vi) and (vii).
64. On 29th January 2018 the defendant received a reply from “Francis J” at WordPress requesting that the defendant sign a notarised declaration stating that the sites [(vi) and (vii)] belonged to him and that he would like them taken down.
65. On 5th February 2018 the defendant wrote again to Sal P at WordPress, requesting the removal of the blogs (vi) and (vii).
66. On 7th February 2018 the defendant received a reply from Yahoo (now Oath (EMEA) Limited):

“We write to inform you that the two URLs referenced in your letter are the subject of pending litigation in the French courts between Oath EMEA and members of the Barclay family, and Oath EMEA will take action as appropriate based on the outcome of that litigation.”
67. On 12th February 2018 the defendant wrote to Francis J at WordPress enclosing a sworn affidavit dated 12th February 2018 confirming that he was the author of the two

blogs (vi) and (vii), and confirming his request that Automattic Inc/WordPress take down the two blogs with immediate effect. The affidavit was sworn before a notary public in London, who charged £100 for the service.

68. On 24th February 2017, having received no response, the defendant e-mailed Francis J at WordPress requesting deactivation of blogs (vi) and (vii) now that he had sent the notarised declaration as requested.
69. On 5th March 2018 the committal application came on for hearing before Cheema-Grubb J. The defendant was still unrepresented, despite persistent attempts to secure pro bono representation. During the first day of the trial he obtained representation. The judge considered it was in the interests of justice to adjourn the matter to afford adequate preparation time. She gave further directions and re-listed the matter for hearing on 16th April 2018. Costs were reserved.
70. On 6th March 2018 the Cour de Cassation in Paris gave its decision on the appeal by the Barclay brothers against the refusal of the French courts to accept jurisdiction in their claim against Automattic Inc., upholding that decision.
71. On 19th March 2018 the defendant received an e-mail from Sal P at WordPress:

“Please note that the visibility of the following sites has been set to private as requested: [URL addresses (vi) and (vii)]. As a reminder, this means that no one can view the blog without an invitation from the blog owner and it will stop appearing in search engine results after a few weeks.”

It is to be noted that this development came less than two weeks after the decision of the French court in favour of Automattic Inc. It is difficult to avoid the inference that the two events were connected.

72. On 22nd March 2018 the defendant wrote to Sal P at WordPress protesting that he had not requested that the two blogs be set to “private”; he had requested they be deactivated completely. He repeated that request. He wrote in similar terms to the chief executive of Automattic Inc.
73. On 23rd March 2018 Sal P from WordPress responded:

“As previously explained we do not remove content from WordPress.com sites unless it is a violation of our Terms of Service or upon receipt and validation of a U.S. court order specifically citing the content at issue. As a courtesy to you, we have set the visibility of the sites to private. No further action will be taken as we have not received the above mentioned U.S. court order from you nor verification meeting our standards that you are indeed the owner of the blogs at issue. Because we are unable to comply further, we are considering this matter closed.”

74. On 27th March 2018 the defendant replied to that e-mail, again referring to the notarised declaration and emphasising that there was no doubt that he was the owner of the blogs.

The committal hearing, 16th - 18th April 2018

75. For the hearing before me on 16th to 18th April 2018 the excessive voluminous documentation had been reduced to more manageable proportions. Cheema-Grubb J had directed that there be an agreed bundle. The former bundles containing all the documentation generated by these proceedings occupied eleven lever arch files, running to 2,900 pages. There was now a much reduced claimant's bundle of three volumes (1,015 pages) and a defendant's bundle in a single volume (485 pages). In accordance with Cheema-Grubb J's directions, the defendant had served a witness statement. In the event, however, he did not give evidence. I shall return to this. There were skeleton arguments from Mr Patel QC dated 1st March 2018, and from Mr Wong dated 15th April 2018.
76. On behalf of the claimant, Mr Tony Khindria (of the claimant's solicitors), gave evidence, confirming the contents of his various affidavits. He was cross-examined at some length on the history of the matter and on assertions made in his affidavits about the conduct of the defendant. Mr Jason Coyne, the IT expert, was called to confirm the contents of his report dated 14th March 2017, and his witness statement dated 11th August 2017. He was cross-examined about the current position in relation to URL addresses (vi) and (vii) and their accessibility to the public now that they have been put in "private view" mode.
77. The defendant elected not to give evidence. I warned him in appropriate terms that it would be open to the court to draw adverse inferences from his failure to give evidence. He had been fully advised by Mr Wong and indicated that he understood the implications of his decision.
78. I heard Mr Wong's closing submissions on the afternoon of 17th April. Overnight Mr Patel prepared and served written submissions. Next morning I gave Mr Wong the opportunity of addressing me further on the new points raised in those submissions. Mr Patel then developed his submissions in reply. Much of counsel's submissions, on both sides, was directed at the sufficiency of the evidence to prove the alleged contempts. There were however, three discrete issues which were raised and upon which I need to rule:
- (a) the enforceability of the Second Order by committal proceedings, in view of the absence of a penal notice on the Order;
 - (b) the evidential status of the defendant's witness statement dated 3rd April 2018, and the documents exhibited to it (contained in the defendant's bundle);
 - (c) the extent to which it is proper to draw an adverse inference from the defendant's failure to give evidence.

79. It is convenient to consider these three issues first, before turning to more general legal principles and a detailed analysis of the allegations of contempt.

The preliminary issues

Absence of a penal notice

80. The claimant is seeking committal for breach of the Second Order, as well as for breach of the First Order. The Second Order has no penal notice. The Order was drafted by the claimant's solicitors and/or counsel and approved by the judge. It is submitted on behalf of the claimant that the absence of a penal notice was merely an oversight.

81. CPR 81.9 provides as follows:

“(1) Subject to paragraph (2) [which does not apply] a judgment or order to do or not do an act may not be enforced under rule 81.4 [an order for committal] unless there is prominently displayed, on the front of the copy of the judgment or order served in accordance with this Section, a warning to the person required to do or not do the act in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets.”

It is well established on the authorities, however, that the court has a discretion to waive this formal requirement in an appropriate case, by exercising its power under paragraph 16.2 of Practice Direction 81 which provides:

“16.2. The court may waive any procedural defect in the commencement or conduct of a committal application if satisfied that no injustice has been caused to the respondent by the defect.”

82. In *Leicester City Council v Saracen Dyers Ltd* [2002] EWHC 2068 (QB) the court doubted whether the absence of a penal notice could be regarded merely as a “procedural defect”. Pitchford J (as he then was) said:

“In my judgment, the burden is upon the claimant to establish that no injustice would be done by waiving a requirement that the penal notice in an order such as this should be prominently displayed at the front of the document. Personally, I doubt whether such a failure could be regarded as a purely procedural defect, given the contents of Order 45 [now CPR 81.9 (1)], but even if it were, I do not consider myself able to exercise my discretion so as to ignore what the Rules of the Supreme Court recognise as a fundamental requirement of such an order (and if one may add in parenthesis it has for many years been the practice that orders must be drawn in terms which bring to the respondent's attention precisely what it is he is enjoined from doing and the consequences if he proceeds nevertheless to do it).”

83. However, the existence of such a discretion was recognised by Kenneth Parker J in *Serious Organised Crime Agency v Hymans* [2011] EWHC 3599 (QB). In that case the order which lacked a penal notice was one which varied a previous order properly endorsed with a penal notice, by adding further assets. Referring to the *Leicester City Council* case, Kenneth Parker J said, at [10] and [11]:

“10. However, it seems to me that the circumstances in this case are very different. First, the order of 3 November 2008 was properly endorsed with a penal notice, and Mr O’Docherty must have known that the same consequences would attach to a breach of the order as so varied. Certainly there is no statement from him saying that he was not aware of such consequences if he breached the order. Secondly, according to Miss Rughani’s unchallenged evidence, Mr O’Docherty was explicitly told on 14 April 2011 of the grave consequences that might result from breach of the order as varied.

11. Accordingly, the circumstances fall squarely within the terms of RSC 45.7 (6) and I see no good reason why the order, as varied, should not be enforced against him under RSC 45.7. In short, Mr O’Docherty well knew that he could be committed for contempt if he breached the order as varied, and there is no injustice whatsoever in enforcing the order.”

84. In the notes to CPR 81.9 in the White Book 2018 (at page 2307) there is reference to two further family cases, *In re DAD* [2015] EWHC 2655 (Fam) and *In re L (A child)* [2016] EWCA Civ 173, in both of which the court declined to waive the absence of a penal notice in a collection order which was sought to be enforced by committal. See also *JSC BTA Bank v Pugachev* [2016] EWHC 192 (Ch) at [31]-[40].
85. In the present case everyone proceeded on the basis that the alleged breaches of the Second Order could be enforced by committal, until Mr Wong very properly raised the point in his skeleton argument. Mr Patel submits that by directing on 1st November 2017 that a consolidated committal application be served, Turner J was implicitly recognising that the Second Order could be enforced by committal. The defendant has never asserted that he did not appreciate that a breach of the Second Order, like a breach of the First Order, could be punished as a contempt of court with the ultimate sanction of imprisonment. Mr Wong submits, however, that it was all the more important that, as a litigant in person, the defendant should have been warned in appropriate terms by a penal notice of the consequences of breaching the Second Order. Mr Wong was unable to point to any specific prejudice.
86. Unlike the SOCA case, the Second Order here was not merely a technical extension of the terms of the First Order, and there is no evidence that the defendant was told in terms at the hearing on 28th March 2017 (or subsequently) that he could be imprisoned for contempt of court by breaching the Second Order. Nevertheless, in my judgment he can have been under no illusion that the consequences of breaching the Second Order would be the same as the consequences of breaching the First Order. If I were required to decide the point, I would exercise the court’s discretion under PD 16.2 to waive the absence of a penal notice in the particular circumstances of this case.

Evidential status of the defendant's witness statement

87. When the hearing of the committal application before Cheema-Grubb J ended on 6th March 2018 with the matter being adjourned, there was a direction that the defendant should file and serve additional witness statements and relevant exhibits for use at trial in compliance with the Civil Procedure Rules 1998 by 4pm on 4th April 2018. The defendant complied with that direction. However, the mere filing and service of a witness statement does not in itself make the witness statement admissible.
88. CPR 32.5 provides:
- “(1) If-
- (a) a party has served a witness statement; and
- (b) he wishes to rely at trial on the evidence of the witness who made the statement,
- he must call the witness to give oral evidence unless the court orders otherwise or he puts in the statement as hearsay evidence.”
89. The practical working of this rule was helpfully explained by Leggatt J in *Blue v Ashley* [2017] EWHC 1553 (Comm), albeit it in the context of when a witness statement is “put in evidence” for the purposes of CPR 32.12 (2) (c), which governs the supply of witness statements to the press (amongst others). At [14] Leggatt J said:
- “It is, however, important to notice that it is only when a witness is called to give oral evidence in court that their statement becomes evidence in the case: see CPR r 32.5. Until then, its status is merely that of a statement of the evidence which the witness may be asked to give. Thus, it quite often happens that a party serves a witness statement from a person who is not in the event called to give oral evidence at the trial. In that event the person’s statement may be admissible as hearsay evidence and may then be admitted in written form; or the statement may not be put in evidence at all - in which case it never becomes part of the material on which the case is decided.”
90. It is common ground that the only basis on which the defendant’s witness statement dated 3rd April 2018 may be relied on as evidence in the trial before me is under the Civil Evidence Act 1995, as hearsay evidence. The basic provision, in s.1(1) of the Act, is that in civil proceedings evidence shall not be excluded on the ground that it is hearsay. However, in estimating the weight (if any) to be given to such hearsay evidence, the court is required by s. 4 of the Act to have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence. In particular the court may have regard to whether it would have been reasonable and practicable for the maker of the original statement to be produced as a witness (here it plainly was), whether any person involved had any motive to conceal or misrepresent matters, and whether the circumstances in which the evidence is

adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

91. The defendant's witness statement does little more than adduce a large number of documents, in chronological order helpfully, many of which were already exhibited to affidavits filed on behalf of the claimant. The same issue of weight attaches to letters and e-mails written by the defendant, whether exhibited to his own witness statement dated 3rd April 2018 or exhibited to affidavits served on behalf of the claimant. To take the most obvious example, the assertion by the defendant in many of his letters to WordPress, and to the claimant's solicitors, that he had lost the passwords and/or e-mails and could not therefore gain access to blogs (vi) and (vii) is not confirmed by evidence from the defendant in the witness box. I shall therefore have to make my own assessment of the weight which may be given to such assertions.
92. However, to the extent that the defendant's witness statement dated 3rd April 2018 merely produces e-mails and letters he sent to or received from WordPress, Google and the like, in the absence of any suspicion that they have been fraudulently created or doctored, the court is more likely to act upon them as genuine e-mail exchanges. In other words the fact of the e-mails having been sent or received is likely to be accepted, though not necessarily the truthfulness of any assertions by the defendant in the e-mails.
93. Mr Wong did not invite me to have regard to any other witness statement of the defendant which had previously been served, save for his witness statement dated 31st October 2017 headed "My rejection of the DMCA Notice route". That statement was already included in the eleven volumes of the bundles for the committal hearing before Cheema-Grubb J, at volume 9, page 2239. I propose to approach that witness statement in the same way as the defendant's most recent witness statement dated 3rd April 2018. To the extent that is necessary to have regard to it all, I shall exercise appropriate caution in assessing its weight, in accordance with s.4 of the 1995 Act.

Inferences from failure to give evidence

94. It is common ground that it is open to the court to draw an adverse inference from the defendant's failure to give oral evidence and subject himself to cross-examination. However, Mr Wong addressed me about the principles on which the court should act in these circumstances, and the restrictions which apply. These were helpfully identified by the Court of Appeal in *Benham Ltd v Kythira Investments Ltd* [2003] EWCA Civ 1794. The court there adopted the analysis by Brooke LJ in *Wisniewski v Central Manchester Health Authority* [1987] PIQR 324, [1998] Lloyd's Rep Med 223: [at 25, 26]:

“(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inference they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

95. In *Benham*, in a passage on which Mr Wong particularly relies, Simon Brown LJ said at [29]:

"Obviously, the possibility of drawing adverse inferences only arises where the defendants have material evidence to give on the issue in question. But generally that will be the case and manifestly it was so in the instant case. As Mance LJ said in paragraph 5 of his judgment in *Boyce v Wyatt Engineering* [2001] EWCA Civ 692:

'There may be some cases, probably rare, in which nothing in the defendant's evidence could affect the view taken about the claimant's evidence or case, but this is not one of them, and care would be required in identifying them.' "

Mr Wong submits that this is indeed one of those rare cases where nothing in the defendant's evidence could affect the view I take about the claimant's case.

96. On behalf of the claimant Mr Patel submits that there is a case to answer on all the allegations of contempt, it would have been reasonable for the defendant to give evidence, and the court may properly draw an adverse inference from his failure to do so.
97. I shall address the evidential significance, if any, of the defendant's failure to give evidence when I analyse the evidence on each alleged breach. It is important to bear firmly in mind, of course, that in these proceedings the burden of proof remains on the claimant throughout and that the alleged breach must be proved to the criminal standard. As Mr Wong rightly submitted, each alleged breach must be examined separately in deciding what, if any, support for the claimant's case is to be derived from the defendant's failure to give evidence

Other relevant legal principles

98. In this committal application the focus has been on the proper interpretation of the terms of the order, in each case, which are said to have been breached, and upon the defendant's ability or otherwise to comply with the order. Helpful guidance on these issues was given by Munby LJ in *L-W (Children) (Contact Order; Committal)*, *Re CPL v CH-W* [2010] EWCA Civ 1253:

“33. The only other authority I need to refer to at this stage is the decision of this court in *Re S-C (Contempt)* [2010] EWCA Civ 21, [2010] 1 FLR 1478, where Wall LJ said this (para 17):

“if... the order... was to have penal consequences, it seems to us that it needed to be clear on its face as to precisely what it meant, and precisely what it forbade both the appellant and the respondent from doing. Contempt will not be established where the breach is of an order which is ambiguous, or which does not require or forbid the performance of a particular act within a specified time frame. The person or persons affected must know with complete precision what it is they are required to do or abstain from doing - see (inter alia) *Federal Bank of the Middle East Ltd v Hadkinson and others* [2000] 1 WLR 1695; *D v D (Access: Contempt: Committal)* [1991] 2 FLR 34 and *Harris v Harris, A-G v Harris* [2001] 2 FLR 895 at para [288].”

In *Harris* I had referred (para [288]) to the decision of this court in *Deodat v Deodat* (unreported) 9 June 1978 as authority for the proposition that it is impossible to read implied terms into an injunction.

34. What I derive from these authorities are the following further propositions: (1) The first task for the judge hearing an application for committal for alleged breach of a mandatory (positive) order is to identify, by reference to the express language of the order, precisely what it is that the order required the defendant to do. That is a question of construction and, thus, a question of law. (2) The next task for the judge is to determine whether the defendant has done what he was required to do and, if he has not, whether it was within his power to do it. To adopt Hughes LJ’s language, Could he do it? Was he able to do it? These are questions of fact. (3) The burden of proof lies throughout on the applicant: it is for the applicant to establish that it was within the power of the defendant to do what the order required, *not* for the defendant to establish that it was not within his power to do it. (4) The standard of proof is the criminal standard, so that before finding the defendant guilty of contempt the judge must be sure (a) that the defendant has not done what he was required to do *and* (b) it was within the power of the defendant to do it. (5) If the judge finds the defendant guilty the judgment must set out plainly and clearly (a) the judge’s finding of what it is that the defendant has failed to do *and* (b) the judge’s finding that he had the ability to do it.”

99. With that guidance in mind, I turn to the allegations of contempt.

The allegations of contempt

100. It is convenient first to consider the allegations of breach of the Second Order, from the hearing on 28th March 2017. As already explained, there are breaches alleged of three paragraphs of that order.

Alleged breaches of the Second Order

(1) *Failing to use his “best efforts” to procure deactivation of the web blogs at (vi) and (vii)*

101. In the schedule of breaches annexed to the consolidated application to commit, the matters relied upon as evidence of the defendant’s failure to use his “best efforts” are pleaded as follows:

“(a) He did not cooperate with Mr Coyne the IT expert (please refer to witness statement of Mr Coyne from page 1734 to 1739).

(b) Writing (allegedly) letters, to the legal department of WordPress and its chief executive Matthew Mullenweg on 3 April 2017 (pages 1573-1579), the tone and content of which were unhelpful and would have probably deterred WordPress from complying with [the Second Order].

(c) Failing to properly instruct WordPress to take down the blogs at URL addresses (vi) and (vii) (page 1629).

(d) Refusing to send a DMCA notice to WordPress (this would have enabled the removal of the blogs) (page 1731).”

102. I accept Mr Wong’s submission that the phrase “best efforts” means the same as “best endeavours”, and that “best endeavours” means the same as “all reasonable endeavours”: see *Rhodri International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 (Comm) at [33] and *Jet2.Com Ltd v Blackpool Airport Ltd* [2011] EWHC 1529 (Comm), at [48]. I accept that there is no absolute obligation to achieve the objective.

103. It is therefore for the claimant to prove, to the criminal standard, that the defendant has failed to use his best efforts to procure the deactivation of blogs (vi) and (vii). That means proving that the defendant has not been genuine in his efforts to achieve that objective and that there was a reasonable step he could and should have taken but failed to take.

104. Mr Wong submits that the defendant has plainly used his best efforts to procure the deactivation of blogs (vi) and (vii) in that:

(1) The defendant granted Mr Coyne rights to communicate on his behalf.

(2) He met with Mr Coyne in a joint effort to try and gain access to the blogs.

(3) He frequently corresponded with WordPress requesting assistance with gaining access to and/or deactivating blogs (vi) and (vii).

(4) He corresponded with major search engine providers Google, Yahoo and Microsoft Bing to have blogs (vi) and (vii) removed from their search results.

(5) He allowed the claimant's solicitors to draft correspondence in his name which he then sent out to WordPress.

(6) On 12th February 2018 he provided the WordPress legal team with a notarised declaration (in the form of an affidavit) as they had requested, declaring his ownership of the blogs.

(7) The defendant acted reasonably in declining to serve a DMCA notice, which was in any event inappropriate.

105. Fundamental to "best efforts" is the issue of whether the defendant had genuinely lost or mislaid the relevant passwords/e-mail addresses for blogs (vi) and (vii), or whether that is a false explanation he has invented to excuse non-compliance with the order. The claimant's main point is that the defendant has not given a consistent account. Mr Patel identified in his closing submissions, at my request, the documents he specifically relied upon in this regard. It is the sequence of e-mails sent by the defendant on 22nd, 23rd and 24th December 2016. I have already set out the relevant content of those e-mails.
106. It is suggested that although the defendant started by suggesting he had lost the *passwords* to various blog addresses, including (vi) and (vii), he then said that he had the passwords to his e-mail accounts but could not identify which *e-mail* applied to which blog. The picture is certainly far from clear in his various accounts, although he set out the position more fully in his letter to the claimant's solicitors dated 3rd April 2017. It is submitted on behalf of the claimant that the suggestion that the file containing the addresses and passwords had gone missing is a convenient excuse. It does not explain how he was able to deactivate blogs (ii) to (v) in due course.
107. Some reliance is also placed on the slender suggestion in a newspaper article from the Birmingham Post in 1998 that, in relation to a magistrates' court hearing in criminal proceedings brought against him by the Department of Trade and Industry, the defendant had given the excuse that his accounting records had been stolen from the boot of his car. In other words it is suggested that this is an excuse that he has used before. Even assuming the newspaper article is accurately reproduced (it appears to be text from someone else's blog) I do not find it compelling, even as a piece of circumstantial evidence, in proving to the criminal standard that the defendant had lied nearly 20 years later about losing the relevant passwords and/or e-mail addresses.
108. On the other side of the coin, it makes no sense that the defendant would steadfastly deny having the relevant passwords and/or e-mails for these two blogs in order to avoid deactivating them, when he has deactivated blogs (ii)- (v). It makes no sense that he would have gone to such lengths to try to persuade WordPress to take down

the blogs (vi) and (vii) if, all the time, he had at his disposal the means to do so himself.

109. In my judgment the circumstantial evidence overall does not compel the inference that he must have had the relevant passwords/e-mails all along. In these circumstances I draw no adverse inference from his failure to give evidence on oath.
110. I turn to the specific matters relied upon as evidence of his failure to use best efforts, listed at (a)-(d) above.
111. As to (a), it is not, in my judgment, a fair criticism to suggest that he failed to co-operate with Mr Coyne. That complaint seems to relate to the matters narrated in Mr Coyne's witness statement, which is confined to the attempts they made together at court on 28th March 2017 to access the relevant URL addresses and/or e-mail accounts. In the light of my conclusion that it is not proved that the defendant was deliberately withholding those details, there is no evidence that the defendant was deliberately seeking to frustrate Mr Coyne's attempts to help him gain access to blogs (vi) and (vii). In the weeks following the hearing on 28th March 2017 the defendant was in regular contact with Mr Coyne and they were plainly co-operating with each other in their efforts to persuade WordPress to take down blogs (vi) and (vii).
112. As to (b), the complaint is that although the defendant was asking WordPress to take down blogs (vi) and (vii), the defendant deliberately undermined the prospect of WordPress co-operating by drawing their attention to and asking them about the pending litigation between WordPress/Automattic Inc and the Barclay brothers in France. In his skeleton argument Mr Patel broadened this allegation to include the defendant's letter of 10th February 2017, as well as the letter of 3rd April 2017. Whilst I accept that it was unnecessary for the defendant to have mentioned these matters, he undoubtedly made the clear and unequivocal request, time after time, that WordPress deactivate blogs (vi) and (vii). I note, for example, that it was the defendant's suggestion that the claimant's solicitors should draft a letter for him to sign and send to WordPress if they thought they could do better, and that was done.
113. As to (c) the complaint seems to be that in an e-mail to WordPress dated 1st May 2017 the defendant asked that five websites be taken down which did not include (vi) and (vii). However, this seems to have been a follow up to the e-mail and letter he had sent to WordPress adopting the claimant's solicitor's draft. The addition to their draft in the letter he actually sent, an addition to which Mr Khindria took no exception, included an additional request to take down the five websites mentioned in his e-mail dated 1st May. In that later email he was simply repeating that additional request. I also note that in the 1st May e-mail he instructed WordPress to communicate directly either with himself or with Mr Coyne. In other words he was hardly making any secret of what he was doing.
114. As to (d), the DMCA notice procedure was, in my judgment, wholly inappropriate in the circumstances of this case. It was mentioned by WordPress as a route by which, in general terms, a URL address could be deactivated. It was understandable that Mr Khindria should latch onto this and draw the possibility to the defendant's attention. But one only has to look at the form which the defendant would have had to complete to see that it was wholly unsuitable, and could not sensibly have been used. The defendant was not complaining that his own copyright had been infringed by the

inclusion of material on his own blog. That would be nonsense. The declarations he would have been required to make, on pain of perjury, were simply inappropriate. Although the defendant went into much greater detail in his earlier witness statement dated 31st October 2017 about the reasons for not going down the DMCA route, I am entirely satisfied on the documents themselves, exhibited on behalf of the claimant, that it was not a reasonable step which he could have been expected to take.

115. More generally, as circumstantial evidence in support of the claimant's case that the defendant had no intention of using best efforts to procure the deactivation of (vi) and (vii), the claimant points to the undoubted hostile animus the defendant bears towards the Barclay brothers. Reference was made to correspondence in 2010 between the defendant and the solicitors then acting for the Barclay brothers, in which financial demands were made by the defendant in without prejudice letters which, it is suggested, may have amounted to blackmail. Reference was also made to the defendant's practice of driving his car around and parking in the area of Berkeley Square in London, close to where members of the Barclay family live, his car having been decorated with slogans and insulting and offensive extracts from the material on his blogs.
116. In view of the narrow issues which arise in this committal application, namely the proper construction of the orders and the adequacy of the steps taken by the defendant to comply, I do not find any of this other evidence of assistance.
117. My conclusion, therefore, is that the claimant has failed to prove the allegation that the defendant did not use his best efforts to procure the deactivation of the web blogs at URL address (vi) and (vii).

(2) Failing to provide the claimant with information to procure the deactivation of web blogs (vi) and (vii)

118. The requirement under paragraph 2 of the Second Order was that the defendant provide to the claimant information, including e-mail addresses, passwords and the like or other forms of identification that may be used to procure deactivation of web blogs (vi) and (vii). I can deal with this allegation shortly. The particulars in the schedule of breaches refer only to one document, the defendant's letter to the claimant's solicitors dated 3rd April 2017, in which he stated:

“I confirm again I did not hold the passwords of the two blogs listed below or the corresponding e-mail addresses or the passwords to those e-mail addresses which were in the same missing file and I cannot remember the missing e-mail addresses used in each blog.”

119. I have already indicated my finding that I cannot be sure that, contrary to what he asserts in this letter, the defendant did in fact have the relevant information but deliberately failed to provide it. Accordingly, the claimant has failed to prove this allegation of contempt.

(3) Failing to provide a written response to the claimant's proposed excisions to content of web blog (i)

120. Paragraph 5 of the order provided:

“The defendant shall on written request within two working days thereon provide to the claimant a written response to the proposed excisions to content on a web blog at URL address (i).”

The allegation is the schedule of the breaches is as follows:

“Despite having agreed at Court to delete certain offensive text in the web blog at the URL[(i)], the defendant point blank refused to modify the blog at all (page 1601) by not deleting any of the text indicated by the claimant.”

121. Again, I can deal with this allegation shortly. In my view it is misconceived. Properly construed, and whatever the wider intention may have been, the words of paragraph 5 of the order do no more than impose a requirement on the defendant to provide a written response to the claimant's proposed excisions. He did provide a written response. He declined to make any excision. Mr Patel submitted that the order must be given a purposive construction. There was an obligation, he submits, to give a meaningful response, not simply to refuse out of hand to accept any of the proposed excisions. In cross-examination Mr Khindria rightly conceded that this paragraph of the order was open to more than one interpretation, although naturally he invited the court to construe the paragraph as requiring a positive response from the defendant.
122. I can well understand the thinking behind this paragraph of the order. It was, or may have seemed to be, a pragmatic compromise. The defendant had already modified the content of blog (i) very considerably, reducing its content from 79 pages (when printed out) to no more than 8 much sparser pages (when printed out). The defendant had indicated at the hearing on 28th March 2017 a willingness not to be insulting in his web blog. There was a reasonable expectation on the part of the claimant's solicitors that the defendant might be willing to compromise further by agreeing to at least some of the excisions they proposed.
123. However, whatever the thinking behind this paragraph of the order, it is open to no other construction than that which I have already set out. In truth, it was never a provision which was capable of enforcement by committal proceedings. I repeat the question I posed to Mr Patel in the course of his closing submissions: how much of the proposed excisions would the defendant have been obliged to accept so as not to put him in breach of the order? One has only to pose this question to see how impossible it would be to construe paragraph 5 so as to give it the effect for which the claimant contends. At the very highest the provision is ambiguous. An ambiguous term of an order cannot be enforced by committal.
124. It follows that the claimant has failed to prove a breach of paragraph 5 of the Second Order.

Conclusion on the Second Order

125. For the reasons I have explained, I find that none of the breaches of the Second Order has been proved. The question of waiving the procedural defect of no penal notice in the order does not, therefore, arise for final determination.

Alleged breaches of the First Order

126. It is alleged that the defendant is in breach of the First Order because he failed to “withdraw forthwith the webpages accessible at the URL addresses: [(i) and (vi) and (vii)]”. In the schedule of breaches it is alleged that “web pages are still accessible at these URL addresses at the date of the consolidated application [13th November 2017]”.
127. Mr Wong submits that the First Order is no longer capable of enforcement by committal. He submits that the terms of the First Order and the terms of the Second Order cannot co-exist. The second Order imposes materially different and inconsistent terms to the First Order. The Second Order addresses and provides new requirements for each of the seven web blogs. Mr Patel submits in response that the First Order and the Second Order are “symbiotic”, and that the Second Order was made to facilitate, and not replace or circumvent, the First Order. He points out that Turner J did not set aside or revise the First Order, or substitute the Second Order for the First Order. It was Turner J who required that a consolidated application be served, encompassing both the First Order and the Second Order.
128. It is necessary to consider separately the position in relation to URL addresses (vi) and (vii) on the one hand, and URL address (i) on the other. Different considerations apply.

First Order, URL addresses (vi) and (vii)

129. Mr Wong submits that, as a matter of construction of paragraphs 1, 2, and 3 of the Second Order, it is clear that Turner J must have accepted that the defendant was unable to deactivate blogs (vi) and (vii), and consequently the requirement in the First Order to withdraw URLs (vi) and (vii) altogether was superseded.
130. I do not accept this argument as a matter of law. The purpose of paragraphs 1, 2 and 3 of the Second Order was to facilitate and encourage the defendant’s compliance with the overriding requirement of the First Order that he “withdraw” the web pages accessible at (vi) and (vii). However, as a matter of practicality, I am satisfied that the claimant has failed to prove a breach of the First Order in relation to URL addresses (vi) and (vii). Applying the principles explained in the authorities, there cannot be a breach of paragraph 1 in relation to (vi) and (vii) by failing to withdraw those web pages completely if it was not within the defendant’s power to do so. On the findings I have made already, it is still not within the defendant’s power to withdraw blogs (vi) and (vii) completely, or to put it more accurately, the claimant has failed to prove that it is within the defendant’s power to withdraw those blogs completely.
131. In any event, having achieved the “private setting” of those URL addresses (vi) and (vii), it is strongly arguable that the defendant has “withdrawn the web pages accessible at” those two addresses. The current position, if anyone were to access those addresses, is that the following information would appear:

“This site is marked private by its owner. If you would like to view it,

You’ll need two things:

“1. A Word.Press.com account. Don’t have an account? All you need is an e-mail address and password - register here.

2. Permission from the site owner. Once you’ve created an account, log in and revisit this screen to request an invite.

If you already have both of these, great!”

132. Should anyone contact the defendant to ask permission to view the web pages at URL addresses (vi) or (vii), the defendant would, in my view, be in breach of the First Order, and in breach of the “best efforts” provision in paragraph 1 of the Second Order, if he were to grant such permission. Similarly, if he were to discover, even at this late stage, the missing passwords/e-mail addresses enabling him to deactivate blogs (vi) and (vii), he would be in breach of the First Order and paragraph 1 of the Second Order if he failed immediately to deactivate those blogs completely.
133. However, for the purpose of the present proceedings, I find that the claimant has failed to prove that the defendant is in breach of the First Order in relation to URL addresses (vi) and (vii).

First Order, URL address (i)

134. The position in relation to URL address (i) is, in my view, much more difficult. Mr Wong essentially makes three submissions:
- (a) The requirement to withdraw the webpage accessible at URL address (i) is no longer enforceable by committal; it has been overtaken by paragraph 5 of the Second Order.
 - (b) In any event, the requirement to withdraw the webpage “forthwith” conflicts with the principle that an order enforceable by committal must specify the time within which the act must be done.
 - (c) In any event the defendant has complied with the requirement to “withdraw” the webpage “accessible at” blog (i) in that the content of that webpage has been replaced with new content.
135. Mr Patel submits in response:
- (a) Turner J did not, by paragraph 5 of the Second Order, permit the defendant to keep blog (i). The requirement to withdraw the webpage accessible at (i) continues.
 - (b) The term “forthwith” is routinely used in mandatory injunctions and the defendant can have been in no doubt about its meaning.

(c) The defendant has not “withdrawn” the webpage accessible at URL (i). Modification does not constitute withdrawal. Blog (i) remains accessible to the public and contains offensive material which the defendant has deliberately chosen not to delete, even though he has the power to do so.”

Discussion

136. As to (a), I reject the argument that paragraph 5 of the Second Order renders enforcement of the First Order impossible. Paragraph 5 was an attempt to arrive at a compromise to avoid a decision having to be made as to whether the First Order had been breached by the continued presence of blog (i). It cannot have been the intention that, by refusing to accept any of the proposed excisions to blog (i), the defendant would be relieved from any liability and from the risk of committal for a continued breach of the First Order in relation to blog (i) as well as for any breach of the Second Order.

137. As to (b), the term “forthwith” is routinely and properly included in mandatory orders. CPR 81.4 (1) provides:

“If a person-

(a) required by a judgment or order to do an act does not do it within the time fixed by the judgment or order; or

(b) disobeys a judgment or order not to do an act,

then... the judgment or order may be enforced by an order for committal.”

138. In my view, on the facts of this case at least, the term “forthwith” satisfies the requirement that an order enforceable by committal must fix the time within which the act is to be done. In a rather different context, it was held by Jackson J in *SK v HD* [2013] EWHC 796 (Fam) that this rule does not mean that a fixed calendar date for compliance must be set in every case. In any event, the defendant can have been in no doubt as to the urgency of the obligation to comply with the First Order, and well understood that obligation. There is no evidence from the defendant to suggest that he was misled in any way by the absence of a fixed date for compliance. Accordingly I reject the submission that the First Order was defective and, for that reason, unenforceable.

Does substantial modification constitute withdrawal of URL (i)?

139. This is the nub of the matter. The construction of paragraph 1 of the First Order is a matter of law. The words must be given their natural meaning and effect. The requirement was to “withdraw forthwith the webpages accessible at the [seven] URL addresses”. The word “webpage” has a specific meaning. The definition in the Oxford English Dictionary is:

“A hypertext document accessible via the web, typically consisting of text, image files, and other content, as well as links to other web pages.”

This is to be contrasted with the term “website”, which is defined in the Oxford English Dictionary as:

“A collection of related and linked web pages hosted under a single domain name, typically produced by a single person, organisation, etc...”

140. It follows, in my view, that the use of the plural “webpages” in paragraph 1 of the Order is not to be regarded as referring to a multiplicity of webpages at each individual accessible URL address. The plural was used simply because there were seven URL addresses listed, each with its own webpage.
141. This is important because it means there is a single “webpage” at URL address (i), irrespective of the extent of the hypertext visible in that document. When the material is printed out it may run to a single page or a hundred pages, but it is still one “webpage”. It follows that, in principle, the mere alteration of the content of the “webpage” does not amount to the “withdrawal” of the “webpage accessible at the URL address” in question. Plainly the changing or deletion of only a few words could not amount to “withdrawal”, otherwise it would be very easy to circumvent the order and frustrate its purpose.
142. However, at the opposite extreme, as Mr Coyne acknowledged in cross-examination, as a matter of practicality there need not be any correlation, at any given, time between the *content* of a webpage at a particular URL address and the *title* of the URL address itself. Thus, if the entire content of the webpage at URL address (i) were changed, so that (for example) it contained material exclusively relating to Premier League football, it would still be the “webpage accessible at” URL address (i). In those circumstances, however, it would be difficult to resist the conclusion that the webpage accessible at that address, at the time the order was made, had been “withdrawn”; in that example the content was now quite different and contained nothing of the original material.
143. I therefore accept that, in principle, there could be a “withdrawal” of the webpage accessible at URL address (i), without taking down or deactivating that address, if the modification was so substantial as to make the content wholly different from that which appeared on the webpage at time the order was made. In the end this must be a matter of fact and degree.
144. Before examining the content of the webpage as it was when the order was made (79 pages as printed out), as compared with the current content (the eight pages of which some excision was proposed by the claimant but not accepted by the defendant), it is appropriate and pertinent to consider the terms of the judgment of the French court, bearing in mind that the English order was made to enforce the order of the French court.
145. At page 2 of the French judgment (as translated) it is recited that “by summons by the plaintiff, the court is requested” to:

“prohibit the continued dissemination in their current state of the pages accessible at the URL addresses [i-vii] in that they constitute mental harassment...”

The words “in their current state” are significant. At page 6 of the judgment, as part of the facts alleged and found proved by the court, it is stated:

“Whereas, in the space of almost four months, [the defendant] multiplied the same type of comments in particular against David Barclay by publishing the above-mentioned articles during this period; that on analysing this said articles, the same recurring themes appear:

- accusations of tax fraud,
- suspicions of corruption,
- comments aimed at David Rowat Barclay’s physical characteristics and those of his family,
- innuendo regarding his sexual orientation,
- dealings with individuals having committed serious offences,
- problems with public and social policy in the territories of Sark and Brecqou,
- surveillance put in place against him,
- multiplication of delaying legal proceedings.”

The judgment went on to give examples of words or expressions in the articles which were of a particularly insulting nature.

146. From this analysis it is important to note that what was originally sought by the claimant was prohibition of the dissemination of the pages accessible at the various URL addresses “in their current state”. That must surely mean the *content* of the webpage for each URL address at that point in time. Bearing this in mind when construing the words of the First Order, I conclude that the principal test in determining whether, as a question of fact and degree, the original content of blog (i) at the date of the First Order was sufficiently changed so as to amount to “withdrawal” of the “webpage accessible at URL address [i]” is whether any of the themes identified by the French Court are still extant in the eight pages which the defendant refused to excise further in accordance with the claimant’s proposals and, if so, whether that is sufficient to amount to a breach of the Order at all, and if so a breach justifying committal.
147. The proposed excisions are exhibited at page 1592-1599 (Vol 1 page 144-151). The full text of the webpage is shown, as at 10th April 2017, the date of the requested excisions pursuant to the Second Order. The text a year later as at 12th April 2018, shortly before the hearing before me, is identical. Much of the unexcised text is not objected to by the claimant. Only limited passages are the subject of the proposed

excisions. The passages that are not challenged by the claimant include the announcement of the forthcoming publication of the unauthorised biography of the Barclay brothers, and an appeal by the defendant for donations to a fund to help him “defend existing and future litigation”.

148. The first proposed excision is the defendant’s description of the “original content of this blog” which he said he had been “forced to remove”, which outlined what the defendant had allegedly been subjected to by way of “systematic harassment”, “systematic defamation”, “voyeurism”, “stalking and photographed”, and “systematic character assassination”. These words and phrases appear in large font against bullet points. The proposed first excision also referred to the failure by the Guernsey police and the Hertfordshire constabulary to instigate a proper investigation following his complaints in 2013 and 2014 of an alleged pattern of criminal behaviour to which he was being subjected. Taking these passages as a whole, this could be said to echo at least part of one of the “recurring themes” in the analysis of the offending articles in the French judgment, namely “surveillance put in place against him”. It does not repeat or touch on any other of those “recurring themes”.
149. The second proposed excision relates to a brief description of a “criminal investigation” instigated by the Guernsey police in November 2014 in which it is said that 54 residents of Sark had provided witness statements citing harassment, intimidation and defamation from the Sark Newsletter, an investigation which the defendant suggested had been “shelved”. This is not one of the “themes” identified in the French judgment, nor can I find any reference to this matter in the original 79 pages of the blog.
150. The third proposed excision (on page 1596) is of a reference to the defendant being hindered in complying with Turner J’s order by the litigation still ongoing in the French courts. This was not a theme identified in the French judgment, nor is it referred to, so far as I can see, in the 79 pages of the original blog. Indeed, it post-dates Turner J’s order.
151. None of the offensive and insulting words and expressions of which examples were given in the French judgment (at page 6), appear in the revised 8 page version. Indeed the nature and tone of the revised version are completely different from the original 79 pages, albeit still highly critical of the claimant.
152. My overall conclusion, looking at the matter in the round, is that there has been such a drastic revision of the original “webpage accessible at URL [i]” that it cannot be said now to contain any significant part of the original content. At most the theme of harassment of the defendant, in Sark and in Hertfordshire, is alluded to. Broadly speaking, however, the current form of the blog is little more than an advertisement for the forthcoming unauthorised biography, a request for donations in support of that work, and a summary of the present litigation and the steps the defendant has taken to comply with the order of Turner J.
153. In my judgment such a radical revision of the content of the blog is tantamount to withdrawal of the webpage accessible at URL address (i) at the date of Turner J’s First Order. To quote from the prohibition sought and granted in the French proceedings, the revised version cannot be regarded as “the continued dissemination in their current state of the pages accessible at the URL address”.

154. If my interpretation of the First Order is wrong, and there is technically a breach of the order by the continued presence of *any* webpage at URL (i) because that URL address should have been “taken down” or “deactivated” altogether, I would not regard the breach as sufficiently serious as to justify any penalty, financial or otherwise, and certainly not such as to justify a sentence of imprisonment, even a suspended sentence.

Overall conclusion

155. It follows that for all these reasons I dismiss the claimant’s consolidated application for committal of the defendant for breach of the First Order and the Second Order. None of the breaches alleged has been proved.

Postscript

156. I should mention for completeness, as part of the narrative of events, that the claimant has returned to the French courts, twice now, to seek the liquidation of the daily penalty of €100 for the defendant’s continuing breach of the order to withdraw the pages accessible at the seven addresses. On 29th June 2017, following a hearing on 1st June 2017, the defendant was ordered to pay the liquidated sum of €10,000 (apparently for the period 29th July 2016 to 9th January 2017, according to Mr Khindria’s affidavit dated 20th February 2018), together with €1,200 costs. On 23rd January 2018, following a hearing on 19th December 2017, the defendant was ordered to pay a further liquidated sum of €34,400, for the period from 10th January 2017 to 9th December 2017, together with €1,200 costs. In that affidavit Mr Khindria suggested that this shows that the French Court clearly considered that the defendant had not carried out the Order to the satisfaction of the court.
157. However, when I raised this point with Mr Patel during his closing submissions he specifically disavowed reliance on any argument that these decisions of the French court are somehow binding on me or should weigh with me for the purpose of the present committal proceedings. Mr Patel was plainly correct to do so, not least because we do not know precisely what evidence was placed before the French Court as to the state of any of the pages at the seven URL addresses at any given time since the original order was made by the French court on 15th January 2016. I note that the defendant was not present or represented at either of these two subsequent hearings in the French court, and that (unlike these committal proceedings) the burden appears to have been on the defendant to “furnish evidence of the performance of the duty to do” that which he had been ordered to do.
158. I must deal, finally, with a further submission made by Mr Wong, namely that this application for committal was oppressive and amounted to an abuse of process. He submits that at most these were allegations of purely technical contempt which, on the face of the documentary evidence, had no real prospect of success. Mr Wong submitted that it is regrettable that the defendant had not secured legal representation sooner, to which he was entitled as of right, with public funding; had he been represented from the outset, application could and should have been made to strike out the committal application as an abuse.
159. Although I have dismissed the committal application, I do not consider that it is proper to describe it as oppressive or disproportionate, or an abuse. It must be

remembered that when the committal application was commenced on 26th January 2017 blogs (vi) and (vii) were still fully accessible. As Mr Wong accepted (on instructions), the content of those two blogs was (and is) very strong, and similar to blog (i) in its original state. They are similarly voluminous: 48 pages (when printed out) for (vi), and 121 pages for (vii). I have examined the material. Nor had the defendant, at that stage, taken any steps to deactivate blogs (ii) to (v). He did so only after the Second Order was made, on 28th March 2017.

160. As to the continued pursuit of the committal application, the combined efforts of claimant and defendant had failed to secure the deactivation of (vi) and (vii), but there was a continuing obligation on the defendant, under the Second Order, to use his best efforts to achieve that. It was only well after the consolidated application was issued that there was a breakthrough in persuading WordPress to take effective action to restrict public access to the blogs, and in persuading Google to remove the material from their search engine. Moreover, if the defendant never had any intention of making any further deletions to blog (i), whatever excisions the claimant might propose, it is regrettable that he did not make that clear to Turner J at the hearing on 28th March 2018 when the Second Order was made.

Ancillary matters

161. As discussed at the conclusion of the hearing on 18th April 2018, I shall consider any ancillary applications arising from this judgment (e.g. costs) on the basis of written submissions, at least in the first instance, and hope that another hearing will not be necessary.