

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Intellectual Property List (ChD)

7 Rolls Building
London EC4A 1NL

Date: 1 February 2022

Before :

MASTER PESTER

Between :

ALI ANSARI
- and -
(1) GOOGLE UK LIMITED
(2) GOOGLE IRELAND LIMITED
(3) GOOGLE LLC

Claimant

Defendants

JAANI RIORDAN (instructed by **Bristows LLP**) for the Defendants
ERIC METCALFE and HENRY EDWARDS (instructed by **McEvedys Solicitors and Attorneys Ltd** and subsequently **Carter-Ruck Solicitors**) for the Claimant

Hearing dates: 10 June and 28 September 2021

APPROVED JUDGMENT

Covid 19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 4pm on 1 February 2022.

MASTER PESTER:

A. INTRODUCTION

1. There are two applications before the Court:
 - (1) An application dated 19 January 2021, by the First Defendant (“Google UK”), asking the Court to strike out or grant summary judgment on the claim against it; and
 - (2) An application dated 26 January 2021, by the Second and Third Defendants (“Google Ireland” and “Google LLC” respectively) for directions.
2. With respect to the application for directions, this has now been agreed in principle by the parties, in regard to Google Ireland and Google LLC. The Claimant (“Mr Ansari”) accepts that he should file and serve amended Particulars of Claim on Google Ireland and Google LLC together with an application for permission to amend in that form. What is very much not agreed is what should be done with regards to Mr Ansari’s claim against Google UK. Mr Ansari submits that Google UK’s application for strike out / summary judgment should be dismissed, and that he should be allowed to pursue his claim, not only against Google Ireland and Google LLC, but against Google UK as well.
3. Mr Ansari, an Iranian / Cypriot national resident in the United Kingdom, brings these proceedings by a claim form dated 21 December 2020. The “Brief Details of Claim”, contained in the Claim Form, are not a model of clarity. They are drafted as a single block of text, without condescending to using individual paragraphs, and extend over a page and a half of single-spaced, small font. In

summary, Mr Ansari avers that he is the owner of the copyright in two literary works: (i) a “Project Goldstar” draft report and schedules dated 12 July 2016 and (ii) comments on the draft report dated 19 July 2016 (hereafter, “the Works”). The complaint is made that the Defendants (undifferentiated) have published the Works and or “Excerpts” from 14 January 2019 through the Google search engine service, Google Search “which provides hyperlinks to, and [sic] the Works and Snippets or Excerpts without the consent of the Claimant or other person with rights in the Works” and that the Defendants (again undifferentiated) have infringed copyrights in the Works.

4. The claims by Mr Ansari against the Defendants relate to an article published by a third party journalist, a private individual, Ms Nikoo Amini, on a website called “Avatoday.net”, which is run by Mr Ali Javanmardi. Mr Javanmardi is resident in the United States, and publishes the website, to which Ms Amini contributes. Neither Ms Amini nor Mr Javanmardi are parties to the current claim in the Chancery Division, although they are parties to separate proceedings in the Queen’s Bench Division brought by Mr Ansari. I will refer to the proceedings in the Queen’s Bench Division in more detail below.
5. The article in question is headed “Documents reveal Iran’s biggest embezzlement scandal ever”. The article makes various allegations, including allegations directed at Mr Ansari, allegations which Mr Ansari contends, in the proceedings in the Queen’s Bench Division, are defamatory.
6. It is possible, albeit only with effort, to identify the relevant causes of action from the Brief Details of Claim on which Mr Ansari relies. Mr Ansari complains that the Defendants (who I will refer to collectively as the “Google Defendants”)

are liable to him for the following causes of action: (i) infringement of copyright in the Works (ii) breach of confidence (iii) misuse of private information (iv) unlawful processing of personal data and (v) causing loss by “lawful and unlawful acts”. Mr Ansari’s claim relates to results provided by Google Search, and also refers to the Google Analytics service, although it is not clear from the Brief Details of Claim how the Google Analytics service is said to be relevant.

7. The existing claim is therefore directed at the dissemination of material over the internet via Google Search, material over which Mr Ansari claims copyright, and which he also claims includes confidential material and / or personal data. There is also what appears to be an unparticularised claim for lawful and unlawful means conspiracy. The Google Defendants have yet to file any defence to Mr Ansari’s claim. However, Google UK’s position is that Google UK does not own or operate, and has never owned or operated, the Google Search service nor (to the extent it is relevant) the Google Analytics service.
8. Therefore, Google UK contends that it cannot be liable to Mr Ansari and it is not a relevant party for any claim in relation to those services. Google UK maintains it is the wrong defendant.

B. PROCEDURAL BACKGROUND

9. As mentioned above, Mr Ansari has also started a claim in the Queen’s Bench Division, in May 2019. There is at least some overlap between that claim in the Queen’s Bench Division, or potential amendments being sought in relation to that claim, and the proceedings before me. That should be of concern to the Court, given that a claimant who sees fit to start two separate claims, in separate divisions of the High Court, in relation to the allegedly wrongful publication of

the same article on the “Avatoday.net” website may well be guilty of an abuse of process. However, the fact that there are partially overlapping claims in the Queen’s Bench Division is not the basis of Google UK’s strike out application before me.

10. My understanding is that the claim form in the Queen’s Bench Division has not been served on Google UK, and the time for doing so has now expired. By a letter dated 8 January 2021, Mr Ansari’s solicitor suggested that there was no duplication with the Queen’s Bench Division action, as Google UK was never served with that action and “is not a party to it”. Presumably, what Mr Ansari’s solicitor meant by that was that the proceedings in the Queen’s Bench Division were not being pursued against Google UK, otherwise the statement in the letter is difficult to accept. Google Ireland and Google LLC have applied to strike out parts of Mr Ansari’s claim in the Queen’s Bench Division, and Mr Ansari has applied to amend parts of his claim in those proceedings. Those applications are currently before Mr Justice Julian Knowles, who has reserved judgment.
11. The two applications by the Google Defendants in the Chancery Division proceedings were listed to be heard by me on 10 June 2021. Shortly before that hearing, on or about 2 June 2021, Mr Ansari’s legal team produced a set of draft “Particulars of Claim” and sent them to the Google Defendants (“the June 2021 Draft”). However, Mr Ansari has not made any application to amend his original claim as contained in the “Brief Details of Claim” within the Claim Form. The status of the June 2021 Draft is therefore somewhat nebulous. Counsel for Mr Ansari invited me to treat the June 2021 Draft as a draft and nothing more, and

disavowed any intention to seek permission at the hearing before me to amend Mr Ansari's claim in the form of the June 2021 Draft, as "it may yet evolve".

12. Also on 2 June 2021, Mr Ansari's evidence in response was served on Google UK after 4.30pm. The evidence was served late, bearing in mind the provisions of CPR Part 24, r. 24.5(1). I was initially concerned by the fact that that evidence, in the form of a witness statement of Mr Ansari's solicitor, is dated 31 May 2021, which suggested to me that the evidence was perhaps served deliberately late. I was told by way of submission from Counsel that this was not the case, and that although the witness statement was signed on 31 May 2021, it took another two days for the lengthy exhibit to it (which extends to a little under 1,000 pages of material) to be finalised. I have no reason to doubt what I was told.
13. I indicated at the start of the hearing on 10 June 2021 that, if the Google Defendants had wanted an adjournment in order to reply to Mr Ansari's late evidence, then I was certainly minded to grant one. However, the Google Defendants indicated to me that they wished to press ahead with the hearing. What then happened was that the Google Defendants served a third witness statement from their solicitor, Victoria Baron, at about 12.30pm, during the course of the hearing itself. I was told that this further evidence was only served to confirm a point made by way of correspondence the previous evening.
14. I took the view that what was, on any view, the late provision of this evidence from Google UK was unfair to Mr Ansari, and that Mr Ansari and his legal team should be allowed a proper opportunity to consider it and make submissions on it. Whilst it was my intention that the hearing should be relisted as soon as

possible, preferably before the summer vacation, due to the counsels' lack of availability the matter did not come back before me until 28 September 2021.

15. I consider both parties' conduct, in the way they approached the hearing on 10 June 2021, to have been less than perfect. Nevertheless, by adjourning the hearing of 10 June to 28 September 2021, matters have been put right. Mr Ansari has been given a fair opportunity to consider the evidence served by Google UK on 10 June 2021.

C. LEGAL TESTS FOR STRIKE OUT / SUMMARY JUDGMENT

16. As regards Google UK's application, there was little substantive difference between the parties regarding the test I am to apply. CPR r. 3.4(2)(a) provides that the court may strike out a statement of case if it appears to the court that "the statement of case discloses no reasonable grounds for bringing or defending the claim ...". The notes to the White Book give as examples claims which are bound to fail, or claims which are "unreasonably vague, incoherent, vexatious, scurrilous or obviously ill-founded and other cases which do not amount to a legally recognisable claim or defence."
17. I was referred to *Kim v Park* [2011] EWHC 1781 (QB), at [40], in which Tugendhat J indicated that where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out a statement of case unless the court has given the party concerned the opportunity of putting right the defect "provided that there is reason to believe that he will be in a position to put the defect right".

18. Counsel for Mr Ansari made the point that the power to strike out should be reserved for “plain and obvious cases” and that the court must be certain that the claim is bound to fail. I was also reminded that it was not appropriate to strike out a claim in areas of law which are uncertain and developing, since in such areas, decisions as to novel points of law should be based on actual findings of fact: *Barrett v Enfield London Borough Council* [2001] 2 AC 550, at p. 557F, per Lord Browne-Wilkinson.
19. As to summary judgment, the applicable principles are found in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), at [15], a case which has been approved by the Court of Appeal on more than one occasion. The applicable principles are as follows:
- (i) The court must consider whether the claimant (or defendant) has a “realistic” as opposed to a “fanciful” prospect of success.
 - (ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.
 - (iii) In reaching its conclusion the court must not conduct a “mini-trial”.
 - (iv) This does not mean that the court must take at face value and without analysis everything that a claimant [or defendant] says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.
 - (v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary

judgment, but also the evidence that can reasonably be expected to be available at trial.

(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

(vii) A short point of law or construction may be suitable for summary determination, and if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it, not least because if a point is bad in law then the sooner it is determined the better.

20. At the adjourned hearing of these proceedings on 28 September 2021, Google UK relied on a trio of further authorities: *Elite Property Holdings Ltd v Barclays Bank plc* [2019] EWCA Civ 204; *Kawasaki Kisen Kaisha Ltd v James Kimball* [2021] EWCA Civ 33; *Maranello Rosso Ltd v Lohomij BV* [2021] EWHC 2452 (Ch). Strictly speaking, not all of these cases involve applications for summary judgment, even if the test applied in those cases was the same test (that is, whether the claim has a real prospect of success). What was said to me is that those cases show that there must be some credible and realistic prima facie

factual foundation to support the suggestion that Google UK specifically has engaged in the acts of which complaint is made.

21. As explained by Cockerill J in the recent decision in *King v Stiefel* [2021] EWHC 1045 (Comm), at [21] – [22], the real practical difference between a strike out application under CPR r. 3.4(2)(a) and a summary judgment application under CPR r. 24.2 is that on a summary judgment application the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will also avoid conducting a mini-trial. But there will be cases “... where the Court will be entitled to draw a line and say ... it would be contrary to principle for a case to proceed to trial.”

D. EVIDENCE BEFORE THE COURT

22. In terms of the evidence before the Court in relation to Google UK’s strike out / summary judgment application, there are three witness statements: the first witness statement of Ms Baron (the Google Defendants’ UK solicitor), the eighth witness statement of Ms McEvedy (Mr Ansari’s then-solicitor) and the third witness statement of Ms Baron.
23. Google UK’s application is based on the following key passages in Ms Baron’s first statement, who says, on instructions from Google UK, the following:
- “10. ... Google UK Limited does not provide any online services, and for the avoidance of doubt it has not done so at any point in the period relevant to this

claim. It does not own or operate Google Search, and it is not responsible for controlling the content appearing on it. Google UK Limited does not host Google Search webpages. Google UK Limited is not the contracting entity in the Terms of Service governing the use of Google Search and it does not therefore enter into contracts with users of Google Search. Google UK Limited does not own the www.google.com or www.google.co.uk domains.

11. In relation to the Google Analytics service, the position is the same: Google UK Limited is not the provider of this service.”

24. Thus, the evidence before me is that Google UK does not operate the two key services, Google Search or Google Analytics, to which Mr Ansari’s claim relates. The basis for Google UK’s strike out and / or summary judgment application is that Google UK cannot be legally liable for the acts of which complaint is made, there is no serious issue to be tried in relation to the allegation that Google UK has any liability to Mr Ansari in relation to the Google Search service or the Google Analytics service, and there are no reasonable grounds for bringing the claim which has no real prospects of success.

25. In response, Mr Ansari relies on the evidence in the eighth witness statement of Ms McEvedy. This is a lengthy statement, and much of it is taken up by setting out extracts from various official reports, to which I refer in more detail below. I observe that, in several respects, Ms McEvedy’s witness statement argues her client’s case, rather than confining herself to factual matters. At its core, Ms McEvedy’s statement submits that the extent of Google UK’s involvement is a

question of fact which cannot be resolved on a summary judgment application.

The key headline points made in that statement are as follows:

- (1) Ms McEvedy suggests that there is a “body of authority” on which Mr Ansari relies (by which Ms McEvedy means, I believe, legal authorities), which it is said demonstrates that local Google subsidiaries, such as Google UK, are establishments of the wider Google undertaking and that their activities are “inextricably linked” with those of Google LLC, such that one cannot distinguish between their acts. It follows, she says, that “the subsidiaries are liable for the acts of Google LLC.”
- (2) The fact that users of the Google Search may not contract with Google UK is neither here nor there, given that none of Mr Ansari’s claims are contractual claims.
- (3) Ms McEvedy asserts that “we do not believe” Google UK’s position that Google UK is not a relevant processor or controller of data for the purposes of the General Data Protection Regulation (“GDPR”), given that Google UK says that “Google LLC does business by or through [Google UK] and/or it is established in the UK by [Google UK]”.
- (4) Reliance is placed on what is described as a “substantial body of official investigation reports and findings” said to evidence that the activities of Google UK and the other Google sales entities and the various Google products and services, including Google Search and Google Analytics, all share data with each other and co-ordinate across some 50 services and applications. The reports referred to are reports by national regulators.

- (5) Finally, Ms McEvedy asserts that there is also evidence that Google Search is used to punish or demote advertisers who offend Google. In this context, Ms McEvedy refers to an article in the Wall Street Journal, as well as to proceedings commenced by Associated Newspapers in the Southern District Court of New York. That last allegation does not seem to go anywhere towards demonstrating that Mr Ansari has a real, as opposed to a fanciful, prospect of succeeding in his claim against Google UK.
26. Ms McEvedy also notes that Google UK is wholly owned and controlled by Google LLC, and that both are parties to the lease of the office premises in London, and therefore they must share space and personnel. Ms McEvedy also refers to her letter, dated 3 February 2021, asking for an explanation as to how Google UK and Google LLC operate together and what information barriers exist between them. Mr Ansari’s complaint is that no proper response was made to that letter.
27. In terms of the official investigations and reports to which Ms McEvedy refers, she relies on the interim report of the UK Competition and Markets Authority (“the CMA”), and also on a report from the Information Commissioner’s Office (“the ICO”), which describes how personal data is processed in relation to the advertising side of Google’s business. The CMA report sets out that Google Search is “by far the most-used general search engine in the UK” and that Google handles a “larger volume of UK search queries and operates a larger volume of UK search advertising inventory than its competitors”: at paragraph 3.25. These reports, in summary, describe what counsel for Mr Ansari described as a highly sophisticated system for the sale of advertising, by harnessing search

engines to combine the attention of their users with contextual or personal information to serve highly-targeted adverts, which are in turn very attractive to businesses. In the words of the CMA Report, at paragraph 2.34, “Search advertising is where an advertiser pays for its adverts (typically in the form of a text link) to appear next to the results from a consumer’s search on an internet search engine, although adverts may also appear in other form of search, for example on maps. The selection and targeting of these adverts is based primarily on keywords entered by the users. Advertisers will pay for their adverts to be displayed when consumers enter particular keywords or phrases.”

28. Relying on those reports, counsel for Mr Ansari asked how would it be possible for Google UK to sell targeted advertising off the back of Google Search without being “inextricably linked” with the parent company’s operations. It is thus submitted on behalf of Mr Ansari that there is indeed a real issue to be tried in this case, namely, whether Google UK is involved in the processing of Mr Ansari’s personal data, not just by way of Google Search, but by the selling of targeted ads.
29. In response to the allegations raised by Mr Ansari about the selling of advertisement, Google UK served evidence in reply, in the form of the third witness statement of Ms Baron. That statement makes the short point that Google UK has not sold “targeted, personalised advertising” against the publication of the material of which Mr Ansari complains. For business customers based in Europe, the Middle East or Africa, Google Ads is provided by Google Ireland.

30. Ms Baron has also exhibited several pages of screenshots of Google Search results, appended to correspondence sent by Mr Ansari’s solicitors. None of those screenshots, provided by Mr Ansari, showing search results linking to the URLs¹ complained of, show any advertising displayed on the same page. It is always difficult for a party to prove a negative. However, it is striking that, although Mr Ansari’s solicitor has obviously been monitoring what results are thrown up by running Google searches in relation to the publication “avatoday.net”, not a single example has been identified of any relevant search results involving any display of paid search advertising.

E. LEGAL AUTHORITIES

31. The potential liability of Google UK has been considered on more than one occasion by the English courts. The most important of the authorities cited to me are: *Tamiz v Google Inc and Google UK Limited* [2012] EWHC 449 (QB); *Richardson v Google UK Limited* [2015] EWHC 3154 (QB); and *ABC v Google Inc* [2018] EWHC 137 (QB).
32. As to the first of these, *Tamiz v Google Inc and Google UK*, this was a claim for defamation in relation to eight allegedly defamatory postings on a blog bearing the name “London Muslim”. The claimant, who was acting in person, did not sue the person who maintained the blog, nor those who wrote the postings, but instead issued proceedings against both Google Inc and Google UK (Google Inc became Google LLC following a corporate restructuring in

¹ “URLs” are “Uniform Resource Locators”, the individual address identifying the location of the web pages.

2017). The court held that the claimant had no valid cause of action against Google UK. The relevant paragraph is at [4], where Eady J said this:

“... Google UK Ltd simply carries on a sales support and marketing business within this jurisdiction. It does not operate or control Blogger.com and has been joined in these proceedings inappropriately. This was explained in a defence served on December 8, 2011. The English company takes no part in the applications before me.”

33. In *Richardson v Google UK Ltd* [2015] EWHC 3154 (QB), Master Kay had struck out a claim for damages for infringement of Article 8 of the ECHR against Google UK in respect of material again posted on the Blogger service. Warby J dismissed the appeal. The claimant had sued or attempted to sue a company that was not responsible for the publication complained of. In other words, the claimant had sued the wrong defendant. Again, the claimant was acting in person.
34. Finally, there is *ABC v Google Inc*, where Julian Knowles J rejected the claimant’s application for an interim injunction to block all access to the “Square Miles News” blog websites and to remove a news reports on the website from a few years ago referring to his conviction and sentence, a conviction which was now spent for the purposes of the Rehabilitation of Offenders Act 1974. In other words, this was a “right to be forgotten” case. Julian Knowles J refused to grant the injunction because the claimant had not effected proper service on the right corporate entity at the right address. The claimant had served Google UK at its principal place of business in the United Kingdom, but that was not the right corporate body (citing the *Tamiz* case).

35. I observe that in each case the unsuccessful party was a litigant in person. As Mr Ansari pointed out, these three authorities need to be approached with a degree of caution regarding what they actually decided. In any event, Mr Ansari's present claim is in relation to the General Data Protection Regulation ("the GDPR") rather than the earlier Data Protection Directive ("the Directive"). Whilst the obligations under the Directive only applied to controllers, under the GDPR there are obligations on the processors of data, not just controllers. Counsel for Google UK nevertheless indicated to me that *Tamiz*, *Richardson* and *ABC* should be taken at least as powerful indicators that the Court could and should strike out a claim on a summary basis where there was no evidential basis to support the claim being brought. This is uncontroversial, as far as it goes.
36. I also heard extensive submissions on Case C-131/12 *Costeja Gonzales v Google Spain SL*, EU:C:2014: 317; [2014] 1 QB 1022 ("*Google Spain*"), a decision of the Court of Justice of the European Union ("CJEU"). The CJEU was being asked to consider the extent of the responsibility of the operator of the search engine. So far as relevant, the facts of *Google Spain* were that Google Inc (now Google LLC) had set up a subsidiary in Spain, which was intended to promote and sell advertising space there. Google Inc's registered office was in California, United States. The CJEU held that the relevant processing did not have to be carried out by the establishment itself, here the Spanish entity, because the test was "in the context of the activities" of the establishment rather than "by" the establishment (see at para. 52). The criterion was satisfied, because (i) Google Spain was established in a Member State; (ii) its activities were intended to promote and sell advertising services in that Member State

with a view to rendering the search engine more profitable; and (iii) it was involved in orienting the controller’s activities towards those living in Spain. It followed that these commercial activities were inextricably linked to Google’s core business and were therefore generated “in the context of” it (see at paras. 56 and 57).

37. In her witness statement, Ms McEvedy argues that *Google Spain* supports Mr Ansari’s resistance to the strike out / summary judgment argument, seizing on the conclusion that the processing activities of Google LLC and its individual European subsidiaries were “inextricably linked”. Therefore, she says, it follows that Mr Ansari has a real prospect of success in establishing at trial that Google UK is a processor and / or controller of personal data for the purposes of the GDPR: see McEvedy eighth witness statement, at paragraphs 21 – 22.
38. However, it seems to me here that Ms McEvedy has misunderstood what *Google Spain* did and did not decide. As Warby J made plain in *Richardson v Google UK*, at [55] – [57], *Google Spain* did not decide “... that subsidiary and parent companies are to be treated as a single unit from the perspective of data protection law, still less that a European subsidiary is or may be liable in respect of data processing activities undertaken in Europe by its US parent”. What the CJEU actually held was that for the purposes of the Directive, Art. 4(1)(a), Google LLC (at that time Google Inc) was established within an EU territory – in that case, Spain – via its establishment, Google Spain. But this is not a decision that Google Spain itself was a data controller for the purposes of the Directive.

39. This can be clearly seen from [49] – [51] of *Google Spain*, where the CJEU noted that:

“49 It is not disputed that Google Spain engages in the effective and real exercise of activity through stable arrangements in Spain. As it moreover has separate legal personality, it constitutes a subsidiary of Google Inc on Spanish territory and, therefore, an “establishment” within the meaning of article 4(1)(a) of Directive 95/46.

50 In order to satisfy the criterion laid down in that provision, it is also necessary that the processing of personal data by the controller be “carried out in the context of the activities” of an establishment of the controller on the territory of a member state.

51 Google Spain and Google Inc dispute that this is the case since the processing of personal data at issue in the main proceedings is carried out exclusively by Google Inc, which operates Google Search without any intervention on the part of Google Spain; the latter’s activity is limited to providing support to the Google group’s advertising activity which is separate from its search engine service.”

40. *Google Spain* does not assist Mr Ansari because the decision merely establishes the responsibility of a parent company for its operation within Europe for the purposes of the Directive; but it does not establish that its subsidiaries are to be held liable for those matters which fall within the responsibility of the parent company. It does not establish that Google Spain was itself a data controller, subject to the Directive. As Warby J held when considering *Google Spain* in *Richardson v Google UK*, the “controller” was Google Inc: see at [58]. It is true

that the “activities” undertaken by Google Spain that served in the opinion of the CJEU to make Google Inc’s operation of Google Search subject to Spanish data protection law were the promotion and sale of “advertising space offered by the search engine which serves to make the service offered by that engine profitable”. But that leaves open the question whether, on the facts of the proceedings before me, Google UK is involved in the promotion and sale of “advertising space” in the first place.

41. I can also accept the submission made by Mr Ansari that *Google Spain*, because it dealt with the position under the Directive, was only focussed on the position of a “data controller”. Under the GDPR, liability attaches to both data controller and data processor. But that still leaves outstanding the question whether Mr Ansari has a real, as opposed to a fanciful, prospect of establishing that Google UK engages in activities which might lead to liability on its part to him, a matter to which I return in the next section of this judgment.

42. I was also referred by both parties to *Fish & Fish Limited v Sea Shepherd UK* [2015] UK SC 10; [2015] AC 1229, the key Supreme Court decision on what needs to be shown when determining whether parties can be sued as joint tortfeasors involved in a common design. In particular I was referred to the speech of Lord Neuberger of Abbotsbury PSC, at [55], where he analysed the three conditions which must be established for a defendant to be liable as a joint tortfeasor:

“It seems to me that, in order for the defendant to be liable to the claimant in such circumstances, three conditions must be satisfied. First, the defendant must have assisted the commission of an act by the primary tortfeasor; secondly, the

assistance must have been pursuant to a common design on the part of the defendant and the primary tortfeasor that the act be committed; and, thirdly, the act must constitute a tort as against the claimant. As Lord Toulson JSC says, this analysis is accurately reflected in the statement of the law in *Clerk and Lindsell on Torts*, 7th ed (1921), p 59, cited by all members of the Court of Appeal in *The Koursk* [1924] P 140, 151, 156, 169.”

43. While this was a dissenting speech, the parties agreed that this was an accurate and concise summary of the legal principles. In particular, no one suggested to me that, as regards setting out the applicable legal principles, there was any difference between what Lord Neuberger had said and what was said by the majority, Lord Toulson and Lord Sumption.
44. Further, Lord Neuberger, in considering the three conditions, went on to say that “... the assistance provided by the defendant must be substantial, in the sense of not being *de minimis* or trivial. However, the defendant should not escape liability simply because his assistance was (i) relatively minor in terms of its contribution to, or influence over, the tortious act when compared with the actions of the primary tortfeasor, or (ii) indirect so far as any consequential damage to the claimant is concerned. Nor does a claimant need to establish that the tort would not have been committed, or even that it would not have been committed in the precise way that it was, without the assistance of the defendant. ...” (at [57]). In relation to the second condition, Lord Neuberger indicated that “... mere assistance by the defendant to the primary tortfeasor, or ‘facilitation’ of the tortious act, will not do ...” (at [58]).

45. Finally, I was referred to the decision of Arnold J in *L'Oréal SA v eBay International AG* [2009] EWHC 1094 (Ch). That involved a claim by L'Oréal SA ("L'Oréal") that eBay Europe had joined in a common design to infringe L'Oréal's trade marks because it had promoted and encouraged and deliberately facilitated the sale of counterfeit goods on the eBay online marketplace. It involved an allegation that eBay had participated in a common design with the third party sellers who were offering those counterfeit goods for sale or, in some cases, offering parallel imported versions of genuine products for sale, albeit ones that had not been authorised for sale within the European Economic Area. L'Oréal submitted that eBay's participation in the common design was established as a result of the following factors: eBay's active promotion of the listing of the counterfeit goods, its degree of control over the content of listings, its control over sellers' behaviour, its intimate involvement in the sales transaction, its administration of complaints and take-down requests in respect of individual listings: see at [360] – [361]. Further, it was submitted that eBay controlled the sale process both legally and technically, and that eBay profited directly from both listing and the sale of items: see at [361].
46. Arnold J rejected part of eBay's case on the facts, and found that eBay "actively encourage the listing and sale of goods from outside the EEA to buyers in the United Kingdom and provide specific facilities to assist sellers to do this. Moreover, no steps are taken to discourage such infringements, let alone to try to prevent them." (at [380]). Importantly however, despite this finding, Arnold J held that "facilitation with knowledge and an intention to profit was not enough" to justify secondary liability. Even though eBay had the ability to take

additional steps to prevent infringement, it did not follow from this capacity that eBay was legally obliged to do so. (at [381] - [382]).

47. According to Google UK, the importance of *L'Oréal v eBay* is that it shows that neither making profit from infringements nor even the deliberate facilitation is enough. It is necessary to establish that there is a common design to carry out the infringing acts.
48. I would add that I was taken to further authorities by the parties, but they seem to me to be of more marginal importance to the issues I have to decide than the ones referred to above. In particular, while counsel for Mr Ansari sought to rely on *TuneIn Inc v Warner Music UK Ltd* [2021] EWCA Civ 441, it seems to me that that case is not really on point. The *TuneIn* case involved the provision by the appellant TuneIn Inc (the defendant in the proceedings at first instance) of an online platform whereby users were provided with hyperlinks to UK and foreign radio stations playing music protected by copyright. In other words, it dealt with the provision of hyperlinks to content known to infringe copyright. It was not a claim against a search or directory site.

F. ANALYSIS AND DISCUSSION

49. As a matter of logic, it seems to me that, on the facts of this case, I must approach the matter in two stages. I should first consider Google UK's strike out application pursuant to CPR Part 3, r. 3.4(2)(a) on the basis of Mr Ansari's current pleaded claim, which is that set out in the "Brief Details of Claim". If I am of the view that that currently pleaded claim (as contained in the Claim Form) merits being struck out, then I should consider, in accordance with the guidance given in the *Kim v Park* case, whether Mr Ansari should be afforded

an opportunity to cure any defect in the existing claim by amendment. As indicated in *Kim v Park*, affording a party the opportunity to replead its case is limited to those cases where “... there is reason to believe that he will be in a position to put the defect right”. It is at that second stage that I can consider the evidence adduced by the parties to consider whether Mr Ansari has a real, as opposed to a fanciful, prospect of succeeding on his claim against Google UK. If Mr Ansari cannot establish that he has a real, as opposed to a fanciful, prospect of succeeding on his claim, then it would be pointless to give him an opportunity to further amend his claim.

50. The existing claim, as contained in the Claim Form, makes no attempt to identify at all, let alone with any precision, how it is that Google UK either committed or assisted the commission of the various wrongs alleged. Where a claim is made against a number of defendants, there should be some explanation as to the role played by the individual defendants. This can certainly be based on inferences, but the statement of case needs to set out the primary facts from which the inferences relied on can be drawn. It also needs to set out with some care the inferences which are said to flow from the primary facts.
51. When one turns to the Claim Form, one sees (among other things) the following principal allegations:
 - (1) The Defendants by their activities processed personal data including the Claimant’s personal data.
 - (2) The Defendants “have published the Works and/or Excerpts from the same from 14 January 2019 through the Google Search Engine”.

- (3) The Defendants have infringed these copyrights in the Works by carrying out and/or procuring, inciting or knowingly assisting others in a common design to infringe these copyrights.
- (4) Confidential documents pertaining to the Claimant and his business activities were published by the Defendants' search engine from 14 January 2019. These documents were "mainly released into the public domain by the Defendants [sic] massive online dissemination of the same". Reference is then made to a letter dated 8 May 2019 in which "the Defendants" (again, undifferentiated) were formally notified to cease and desist. It then is asserted that the Defendants thereby breached their duty of confidence.
- (5) There is also the allegation that "the Defendants have therefore misused the Claimant's personal data". And it is said that "... the Defendants *or some of them* are data processors and controllers in relation to the [data and information in the Works and Confidential Documents] ..." (emphasis added)
- (6) A further allegation is that "[T]here was a Google Analytics account and so an agreement as between the Defendants and avatoday.net [sic] and a "combination", between them ..." No particulars are given as to the nature of the agreement or combination alleged, nor as to how Google UK is said to have become a party to this agreement or combination.
- (7) Finally, it is pleaded that "[A]fter 8 May 2019's Notice, the Defendants acted with an intention to injure the Claimant or were reckless ... and lawful and unlawful acts [unspecified] were carried out pursuant to the combination or agreement ...".

52. It is not open to Mr Ansari to advance unparticularised high level allegations against “the Defendants”, without some indication of the relevant duty which Google UK has breached or how the publication of the article in Avatoday.net gives rise to liability on the part of Google UK. Those extracts from the claim, and the repeated reference to various acts of “the Defendants”, demonstrate that Mr Ansari has made no attempt to indicate how it is that Google UK had any liability for the acts of which complaint is made in this claim. It is insufficient to plead “the Defendants or some of them” and leave it at that. In other words, I am satisfied that, in so far as Google UK is concerned, the existing claim discloses no reasonable ground for bringing the claim, and that the existing claim, certainly as against Google UK, is unreasonably vague, embarrassing, and unparticularised. That justifies granting an order in Google UK’s favour, pursuant to CPR r. 3.4(2)(a).
53. By the time of the hearings before me, it appeared that Mr Ansari in fact recognised that the existing details of claim were insufficiently particularised and would need to be revisited by amendment. Even though I am satisfied, as I am, that Google UK is otherwise entitled to an order under CPR Part 3, r. 3.4(2)(a), the next question is whether Mr Ansari should be given a further opportunity to amend his claim in order to advance a viable claim against Google UK. It might be said that Mr Ansari has already sought to avail himself of such a further opportunity by serving in June 2021 the draft “Amended Particulars of Claim”. While his counsel submitted at the hearing that this was no more than a draft, and little if any reliance was placed by Mr Ansari on it, counsel for Google UK submitted to me that the significance of the June 2021 Draft was that Mr Ansari had already had an opportunity to try again and put

his claim against the Google Defendants in better shape, and there was still no proper cause of action, certainly at least as against Google UK. Whilst the June 2021 Draft is a longer and clearer document than the original claim, it does seem to me that no proper case is made against Google UK, given that the document refers to the activities of “the Defendants” in unparticularised form.

54. In deciding whether I should grant Google UK summary judgment at this stage, it seems to me that the key points are as follows.

55. *First*, Mr Ansari submitted to me that this was a developing area of law, where the court should be particularly cautious before granting a strike out application. Mr Ansari suggested there is here a new regulatory framework, the GDPR, where the concepts are still evolving. Counsel for Google UK submitted that this was not properly characterised as a developing area of law. Whilst I accept that the concepts involved in data processing law are indeed being further refined, it does seem to me that there was a failure on the part of Mr Ansari to identify precisely what specific proposition of law was said to be developing. I note, for example, that what constitutes an establishment is the same under the GDPR as it was under the Directive. In any event, the way matters were put in Ms McEvedy’s statement was primarily that I should dismiss Google UK’s application, not because this was an evolving area of law, but because complex issues of fact are involved, which are unsuitable for determination on a summary basis.

56. *Second*, at the hearings before me, on 10 June and 28 September 2021, the focus of Mr Ansari’s case had rather shifted, from the reliance on the Google Search, to a submission that Google UK must be involved in processing Mr Ansari’s

personal data via Google Ads. (I note here that the original claim did not plead any discernible case arising from the selling of advertising). In submissions, the way it was put to me was that, when asking the question, does Mr Ansari have a realistic prospect of success of showing that Google UK is processing Mr Ansari's personal data, the answer was "yes", because it was said that the weight of the evidence plainly shows that Google UK was involved in the selling of advertising. At the hearing on 10 June 2021, Counsel for Mr Ansari submitted that "our case, in very crude terms, is that the sale of advertising and the offering for sale of advertising, given the nature of the product, involves the processing of the personal data."

57. The difficulty faced by Mr Ansari is that there is, quite simply, no evidence before me that Google UK is involved in the process of advertising. I take into account what is said in Ms Baron's third witness statement, which seems to me to be a complete answer to the submission that Google UK is somehow involved in processing Mr Ansari's personal data. Google Ireland operates Google Ads. There has to be some evidence before me that Google UK is selling advertising before one begins to get into the area where I could be prepared to rule that there is a triable issue that Google UK is processing Mr Ansari's personal data. In this context, I note that I have not been taken to a single ad being shown alongside a particular single link. I remind myself that, as this is a summary judgment application, in reaching my conclusion I must take into account not only the evidence actually placed before me on the application, but also the evidence that can reasonably be expected to be available at trial. The case might be different if there were evidence even of a single ad being shown alongside particular links. But it is not enough to submit that the case against Google UK should go

forward on the basis that something might turn up, for example following disclosure, when the existing evidence does not suggest that there is any realistic prospect of anything further turning up.

58. *Third*, I need also to consider the actual evidence put forward on behalf of Mr Ansari as contained in Ms McEvedy's statement. I have already noted that Ms McEvedy's statement is very long, and argumentative, while the exhibits to it run through many hundreds of pages. The courts are of course familiar with the situation where a respondent to a summary judgment application files a great wad of material, as part of the submission that matters are very complex and the court should refuse to grant summary judgment. However, whilst I accept that the regulatory reports exhibited to the statement illustrate the highly sophisticated nature of the Google provision of advertising services, none of the reports address the position of Google UK. Counsel for Google UK submitted that in spite of its volume, none of the material assisted in establishing a factual basis for the claim against Google UK. I accept this.

59. It is not enough for Ms McEvedy to assert that she does not believe that Google UK is not a relevant processor or controller of data for the GDPR. Nor is it enough to ask rhetorically "if Google UK is not providing a search function, or selling advertisement, then what is it doing?". It is said that the reasonable inference is that where a parent company is running a vast transnational organisation then it will look to local subsidiaries to assist it. However, as a matter of pleading, before one can rely on inferences, there must be some primary facts from which such inferences can be legitimately drawn.

60. It also therefore seems to me that Mr Ansari's submissions ignore the principle of separate corporate existence. The fact, even if it is true, that Google UK and Google LLC share the same personnel, or share office space, is not enough to get Mr Ansari over the hurdle of showing that he has a real prospect of showing that it has a claim under the GDPR against Google UK (as opposed to Google Ireland and Google LLC). Further, the principle established in the cases on joint tortfeasorship to which I was taken (*Fish & Fish v Sea Shepherd* and *L'Oréal v eBay*) is that mere facilitation is not enough in any event to establish liability.
61. Mr Ansari's counsel submitted to me that Ms Baron's evidence was very carefully drafted, and was terse, and that it verges on the cryptic. I do not find it so. It sets out clearly what Google UK does (sales support and marketing, engineering, human resources, finance and communications) and, perhaps more importantly, what it does not (any online services).
62. *Fourth*, in relation to the Data Protection claim, Mr Ansari relies on the *Google Spain* decision, particularly at paragraph 56, to submit that the processing activities of Google UK and Google LLC were "inextricably linked". I have already explained above in Section E dealing with the legal authorities to which I was taken why Mr Ansari's reliance on *Google Spain* is misplaced. In summary, *Google Spain* does not assist Mr Ansari because the decision merely establishes the responsibility of a parent company for its operation within Europe but does not establish that its subsidiaries are to be held liable for those matters which fall within the responsibility of the parent company. *Google Spain* holds that the claimant could sue Google LLC (the parent) under Spanish

data protection law, because Google LLC had an establishment there, in the territory of a member state.

63. *Fifth*, I need to consider Mr Ansari’s claim that Google UK can be liable as a joint tortfeasor. On behalf of Mr Ansari, it was submitted that it was fair to infer that the three Google Defendants act together “by way of corporate structure”. But again there is no evidence to support this, and it ignores the principle of separate corporate personality. It is not legitimate to infer assistance or a common design from the mere fact that one company, here Google LLC, has overall control of another, here Google UK: see *Unilever plc v Chefaro Proprietaries Ltd* [1994] FSR 135, at pp. 141 – 142 (per Glidewell LJ). The authority of *Fish and Fish v Sea Shepherd* establishes that in order to be liable with a principal tortfeasor a defendant had to be proved to have combined with the principal tortfeasor to do, or secure the doing, of acts which constituted the tort, and that he had done so in pursuance of a common design. Of course, I am only dealing at this stage with a summary judgment application, so Mr Ansari need only establish some primary facts to be able to allege a combination in pursuance of a common design. But Mr Ansari has failed to identify what primary facts it is which he can point to give rise to an allegation of the relevant combination such as to survive a summary judgment application by Google UK.
64. When pressed, Mr Ansari appeared to rely on the following to infer the existence of a common design: (i) the existence of the corporate structure together with (ii) the exceptionally complex services provided. In this case, I have been given no particulars as to how Google UK joined in the common design or what assistance was given in relation to a particular search. I note,

again, that mere facilitation is insufficient even if accompanied by profit: see *L'Oréal v eBay*. On the evidence before me there is no proper basis for alleging the participation by Google UK in a common design. There is no explanation as to what has been done by Google UK in furtherance of the common design.

65. Finally, it was also submitted to me by counsel for Mr Ansari that it was “more likely than not” that Google UK operates or owns servers in the United Kingdom. And it was said that, if that were the case, then there was going to be the processing of data in the United Kingdom. However, I have no evidence regarding the location or ownership of any servers. In any event, Mr Ansari needs to demonstrate not only that data is being processed but that it is unlawfully processed. The submission is therefore not only wholly speculative and unsupported by any evidence but was also not developed in any significant way before me.

66. It might be said that, given that Google Ireland and Google LLC have not (yet) applied to strike out Mr Ansari’s claim in the Chancery Division, or to obtain summary judgment, and that the parties agree that Mr Ansari is to be given a further opportunity to produce a draft amended Particulars of Claim, it would be appropriate for the court to delay making a final decision in relation to the claim against Google UK as well. I have carefully considered whether that would be a better approach. Mr Ansari has already produced a first draft amended Particulars of Claim, those dated 2 June 2021. As I have indicated above, Mr Ansari has still made no attempt in the June 2021 Draft to set out how Google UK (as opposed to the Defendants generally) carried out any processing of data (still less any unlawful processing) or breached any other

duty to Mr Ansari. To give Mr Ansari a further attempt to try and set out a proper claim against Google UK would be to have the parties incur further time and costs, quite apart from the judicial time involved in considering whether such a third attempt to set out a proper claim against Google UK was sustainable.

67. In this case, all the evidence before the court supports the view that there is no triable issue against Google UK. Just as in the earlier authorities, Google UK is not the correct defendant to the claim. In these circumstances, I have come to the clear view that it would not be appropriate to give Mr Ansari another further opportunity to try and pursue the claim against Google UK.

G. CONCLUSION

68. It follows, for the reasons set out above, that it is appropriate to grant Google UK an order striking out the claim as against it and / or granting Google UK summary judgment on the claim against it.
69. By way of postscript, it may be asked why Mr Ansari has opposed Google UK's application with such tenacity, given that both Google Ireland and Google LLC have indicated that they do not contest jurisdiction and have accepted service of the proceedings on them. On behalf of Google UK, it was submitted to me that Mr Ansari's real desire is to revive a claim against Google UK in the Queen's Bench Division proceedings. Google UK speculates that Mr Ansari hopes that the claim in the Chancery Division can be transferred at a later stage to the Queen's Bench Division, thus enabling him to seek consolidation of the two proceedings and thereby somehow bring Google UK back into the proceedings.

70. On behalf of Mr Ansari, it was submitted that it was essential for Google UK to remain a party, because it was said that, were a judgment to be obtained against Google Ireland and Google LLC, it might prove difficult or even impossible to enforce a judgment of the High Court of England and Wales either in Ireland (where Google Ireland is based) or the United States of America (where Google LLC is based). It was said to me that Google LLC had applied in 2017 in the Federal District Court in California to obtain an injunction preventing the enforcement of a decision of the Canadian Supreme Court. It is also said, somewhat implausibly in my view, that Google LLC may “leave” the United Kingdom. As regards Google Ireland, Ms McEvedy in her witness statement expresses the concern that, post Brexit, there may be difficulties in enforcing a judgment of the High Court in Ireland.
71. Ultimately, I do not have to decide those rival contentions regarding Mr Ansari’s reasons for bringing his claim against Google UK. Whatever Mr Ansari’s motivations were for bringing these proceedings against Google UK, and whether they are justified or not, I have reached the clear view that Google UK is not the correct defendant to Mr Ansari’s claim.