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Case No: IP13M05063

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY ENTERPRISE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2014

Before :

MR. JUSTICE BIRSS

Between :

OMNIBILL (PTY) LIMITED

Claimant

- and -

(1) **██████████ LIMITED (in liquidation)**

(2) **MR ROBERT ASHLEY CARTER**

Defendants

Henry Ward (instructed by **Stevens & Bolton LLP**) for the **claimant**
Jeremy Heald (instructed by **Greenwoods LLP**) for the **second defendant**

Hearing dates: 6 October 2014

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.

.....
MR. JUSTICE BIRSS

Mr. Justice Birss:

1. This is a copyright action. It relates to copyright in a large number of photographs. The photographs appear on a website operated by the claimant for the provision of escort services in South Africa. The claim arises because copies of the photographs have appeared on a website providing similar and competing services at [REDACTED]. I will refer to this website as the [REDACTED] website. There is not now any dispute that copyright in the photographs belongs to the claimant or that copies of the photographs were taken from the claimant's website and placed onto the [REDACTED] website in question. The photographs are used as part of advertisements by escorts offering escort services. The advertisements are generally pornographic in nature.
2. The claimant contends the [REDACTED] website was and is the first defendant's website.
3. The first defendant is a UK company. It was incorporated on 20th June 2012. It has no employees. The proceedings were issued in November 2013. The first defendant went into liquidation on 17th April 2014 and since then took no part in the action. The second defendant, Mr Carter, is a British citizen. He was the sole director and is the sole shareholder in the company. The claimant claims that Mr Carter is personally liable for the infringements. The claim for personal liability is put in different ways which I will return to. Mr Carter denies he is personally liable.
4. The technical work to set up the website was undertaken by a Mr van Tonder, a South African national. Mr van Tonder is a man Mr Carter met at a party in South Africa. Mr van Tonder is neither an employee, director nor shareholder in the first defendant. It is plain that the [REDACTED] website was supposed to have been the first defendant's website all along but a question I have to decide is whether the first defendant bears legal responsibility for it.
5. Mr Carter denies that the first defendant is responsible for the website on the following basis. Although Mr Carter and Mr van Tonder were working together in relation to this website from June 2012 onwards, they fell out in about November 2013 after these proceedings were issued. Mr Carter says that in the course of these proceedings he has discovered that in fact Mr Van Tonder had kept all the access codes for the website and retained registration of the domain name. As a result Mr Carter (and therefore the first defendant) has no actual control over it.
6. That may be so but it is not determinative of the question of legal responsibility. It is clear from Mr Carter's evidence (i) that the domain name should have been registered in the first defendant's name, (ii) that Mr Carter paid all the relevant costs so that the website would belong to the first defendant company and (iii) that he gave all the instructions to Mr van Tonder on the company's behalf. When Mr van Tonder undertook the work setting up the [REDACTED] website itself he was doing so on the instructions of Mr Carter acting in his capacity as the director of the first defendant. In my judgment the first defendant is and always has been entitled to require Mr van Tonder to provide the access codes and transfer the domain registration. I find that at all material times the first defendant has been and is legally responsible for the [REDACTED] website.

7. In the joint Defence of the first and second defendants dated 30th January 2014, signed with a statement of truth by Mr Carter personally and as a director of the first defendant, the first defendant has admitted reproducing a substantial part of each of the copyright works and admitted communicating the same to the public. However it denied that it has done so in the UK and therefore denied that the first defendant has infringed the claimant's copyright.
8. A major issue in this case is whether the website or the relevant parts of it are targeted at the UK. It is common ground that if they are targeted at the UK then infringement of UK copyright has been committed by the first defendant. If the website is not targeted at the UK then no infringement of UK copyright has taken place at all.
9. The claimant's evidence consisted simply of the Particulars of Claim and Reply which were signed using the appropriate statements of truth applicable in the Intellectual Property Enterprise Court. The order made at the case management conference on 19 April 2014 directed that they stand as evidence at trial. In the end the defendant elected not to cross examine the relevant individuals on the claimant's side.
10. The defendant's evidence consisted of the Defence and Mr Carter's first and second witness statements. Mr Carter was cross-examined on his evidence and I will deal with that below in the context of the issue of his personal liability.

Communication to the public, targeting the UK

11. Mr Carter's position was that the servers which hosted the website are not located in the UK. Although the claimant did not entirely believe this evidence there is no evidence to the contrary. I will work on the basis that the servers are not UK based. Accordingly it was common ground that the relevant question was whether the acts of communication to the public are targeted at the public in the UK. Both sides referred to the analysis of this question by Arnold J in *EMI v BSKyB* [2013] EWHC 379 (Ch), and in particular to paragraphs 48 to 51, as follows:

48. The third question is whether the act of communication to the public occurs in the UK. Since the operators appear to be based outside the UK, the question is whether their acts of communication to the public are targeted at the public in the UK.

49. In considering this question, it appears from the judgment of the CJEU in *Football Dataco v Sportradar* at [35]-[46] that it is relevant to take into account, by analogy, criteria which the CJEU has treated as relevant to the issue of targeting in a number of other contexts: see Joined Cases C-585/08 and C-144/09 *Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Heller* [2010] ECR I-12527 (Article 15 of Council Regulation 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels I Regulation")); Case C-324/09 *L'Oréal SA v eBay International AG* [2011] ECR I-0000, [2012] EMLR 6 (Article 5 of Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of

the Member States relating to trade marks ("the Trade Marks Directive") and Article 9 of Council Regulation 207/2009/EC of 20 December 1993 on the Community trade mark ("the CTM Regulation"); and Case C-5/11 *Donner* [2012] ECR I-0000 (Article 4 of the Information Society Directive).

50. In *Pammer and Hotel Alpenhof* the Court of Justice held at [93] as follows:

"The following matters, the list of which is not exhaustive, are capable of constituting evidence from which it may be concluded that the trader's activity is directed to the Member State of the consumer's domicile, namely the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists."

51. The Claimants rely upon the following factors as indicating that the Websites, and hence the operators' acts of communication to the public, are targeted at the UK. First, there are a large number of users of each Website in the UK. Secondly, a substantial proportion of the visitors to each Website is from the UK. Thirdly, the recordings listed on each of the Websites include large numbers of both (a) recordings by UK artists and (b) recordings that are in demand in the UK. Fourthly, the default language of each of the Websites is English. In addition, in the case of KAT, it includes advertisements with prices in sterling. In my judgment KAT is reasonably clearly targeted at the public in the UK. The position is less clear in the case of H33T and Fenopy, but I reach the same conclusion.

12. It is clear that the question of whether a website is targeted to a particular country is a multi-factorial one which depends on all the circumstances. Those circumstances include things which can be inferred from looking at the content on the website itself and elements arising from the inherent nature of the services offered by the website. These are the kinds of factors listed by the CJEU in *Pammer* in the passage cited by

Arnold J. However as can be seen from paragraph 51 of Arnold J's judgment he took other factors into account too, such as the number of visitors accessing the website from the UK. I agree with Arnold J that these further factors are relevant. Their relevance shows that the question of targeting is not necessarily simply decided by looking at the website itself. Evidence that a substantial proportion of visitors to a website are UK based may not be determinative but it will support a conclusion that the acts of communication to the public undertaken by that website are targeted at the public in the UK.

13. Mr Ward submitted that a flaw in the argument from the second defendant on this issue was that the second defendant appeared to contend that because the [REDACTED] website or relevant parts of it were targeted at South Africa, it necessarily followed that it was not targeted at another state such as the UK. Mr Ward submitted that a website is capable of being targeted at multiple states and so, identifying that one of the states the site happens to be targeted towards is (say) South Africa, does not necessarily prove that the site is not targeted at both the UK and South Africa. I accept Mr Ward's submission. Particularly in the context of English language websites, it is important to take into account the possibility that a website or webpage may be targeted at more than one state.
14. Mr Ward is right that a number of the arguments advanced by Mr Heald, while they undoubtedly support the submission that South Africa is one of the states to which the relevant website is targeted, do not face up to the possibility that the website can be regarded as being targeted at more than one state.
15. Another aspect of targeting which was common ground but is worth highlighting is that the entire contents of a website will not necessarily have to be treated in the same way. They may not all be targeted at the same country. No doubt many websites are targeted at only one country but there is no reason in principle why some parts might be targeted differently from others. It is a question of fact. The example discussed in argument was my finding in *Thomas Pink v Victoria's Secret* [2014] EWHC 2631 (Ch) that certain pages on Facebook were not targeted at the UK. That was not a finding about other pages available on facebook.com.
16. I turn to consider the question of whether the [REDACTED] site or the relevant parts of it are targeted at the UK.
17. If a user instructs their web browser to go to the URL [REDACTED] the user will be presented with a page which bears the flags of seven countries: the UK, South Africa, Brazil, the USA, India, Italy and Spain. The flag of each of those seven countries is superimposed on an outline of the country itself. These are presented under the heading "Escort country websites click below to find escorts in the country of your choice". The text underneath reads "welcome to [REDACTED] your free escort global directory search engine" and it continues to explain the service offered by the website.
18. If a user clicks on a country they are taken to a sub-domain. Thus clicking on the image of the UK takes the user to the sub-domain [REDACTED]. On that sub-domain the user is presented with an advertisement for escort services. The relevant sub-domain in this case is the South African sub-domain at

[REDACTED] It is reached by clicking on the image of South Africa. The reproductions of the claimant's photographs appear in that sub-domain.

19. A dispute arose about languages. The global front page at the [REDACTED] site and the UK and South African sub-domains are written in English. It was said by the claimant that the other sub-domains including the Brazilian, Italian and Spanish sub-domains are also in English and that is another indication of targeting towards at least the English speaking world. However, Mr Heald pointed out that this has not been elaborated in the evidence and that Mr Carter's position was that although the Brazilian sub-domain was in English there was also a Portuguese translation available. I will not take into account the language of the Brazilian, Italian and Spanish sub-domains.
20. The second defendant's argument is that although the overall top level domain is clearly directed globally and although there are sub-domains on the site which are directed to other countries, the relevant sub-domain is the South African one and that sub-domain is directed to South Africa rather than the UK. On the South African sub-domain are the advertisements by escorts offering escort services. The escorts appearing on the South African sub-domain are individuals based in South Africa.
21. Mr Heald submits that there are four factors which support the case that this sub-domain is targeted at South Africa and not targeted at the public in the UK. They are:
 - i) the name South Africa appears in the domain name,
 - ii) where prices are listed they are given in South Africa Rand,
 - iii) the "contact us" page provides a contact telephone number prefixed with the international dialling code for South Africa (+27) and
 - iv) the site advertises the services of escorts located in South Africa and those services are intended to be used in South Africa.
22. It is plainly the case that the term "South Africa" appears in the name of the sub-domain and on the evidence it is true that, where prices are listed in the sub-domain, they are given in South African Rand.
23. The point on the "contact us" telephone number is not a point in the second defendant's favour. If the phone number given has an international dialling code then that clearly indicates that it is directed at people from outside the state in question. This was recognised by the CJEU in *Pammer* (cited in *EMI* above). When this was pointed out, Mr Heald submitted that the telephone numbers of the escorts themselves are given with local South Africa numbers. I will assume that is true although it was not explained in the evidence.
24. As best I can tell, Mr Heald's fourth point is correct in fact.
25. Mr Ward submits that although these points are correct (subject to the "contact us" telephone number), nevertheless all they really amount to is showing that South Africa is one of the States to whom the sub-domain is directed. He contends that taken as a whole, the court should conclude that the [REDACTED] site as whole, and the

South African sub-domain included within it, is/are targeted at least to a material extent to the UK as well.

26. Mr Ward draws attention to the following:
 - i) The visitor traffic data;
 - ii) The terms and condition stated on the website;
 - iii) The structure and nature of the overall [REDACTED] site.
27. I turn to the visitor traffic analysis for the [REDACTED] website. This includes independent websites at www.webstatsdomain.org and www.statsofdomain.com. The first site gives percentage figures for visitors to the South African sub-domain. It states that South African visitors account for 54% of the visitors to the sub-domain, while UK visitors account for 27% of the visitors. Although there is a mistake on the webstatsdomain website muddling the names and the flags, in my judgment it is clear that the 27% figure is intended to apply to UK visitors.
28. Mr Heald submits that no proper evidence has been given to substantiate the methodology used by these sites. That is true up to a point but in my judgment in the IPEC and in the absence of any substantive challenge to these figures from the defendants there is no reason not to take them at face value, provided one exercises a degree of caution.
29. The statsofdomain site states that there are 4,168 daily visitors to the South African sub-domain, 647 daily visitors to the UK sub-domain, 125 to the overall domain [REDACTED] and about 70 shared between the remaining US, India, Italy and Spanish sub-domains. Also to the site as a whole (putting all the sub-domains together) there are 2,752 daily visitors from South Africa, 1,295 daily visitors from the UK and the rest from other countries.
30. Mr Ward submits that these figures present a broadly coherent picture that the South African sub-domain is by far the largest and most significant element in the [REDACTED] website overall (this is not disputed). Mr Ward also submits that they show that the South African sub-domain receives something of the order of four thousand average unique visitors per day and that as an absolute minimum on the figures, at least 10% of the visitors to the South African sub-domain must be UK visitors. That 10% minimum comes from taking the overall number of UK visitors (1,295) and assuming in the defendants' favour that as many as possible of them visit all the other sub-domains apart from the South African sub-domain. That leaves a minimum of 448 UK visitors whom one can presume visited the South African sub-domain. I accept Mr Ward's submission.
31. Although one cannot be precise, it seems to me that both statistics sites together present essentially the same picture about the share of the visitors and the number of visitors to the different sub-domains.
32. A separate source of information is from a site called revolvermaps accessible via an icon which appears on the [REDACTED] website itself. This presents a figure of 10% (9.76%) of the number of visitors to the South African sub-domain as coming from

the UK as opposed to 69% from South Africa. Mr Heald submitted that these numbers are not reliable and hinted in his submissions the possibility that these numbers referred to the overall domain and not the South African sub-domain. That may be so although I note that Mr Carter has made little attempt to establish any of this. I have not forgotten that Mr Carter contends he has no technical access to the website anymore since Mr van Tonder has the passcodes.

33. Taking all this traffic information together, I infer that a substantial proportion of the visitors to the South African sub-domain come from the UK. The qualitative expression “substantial proportion” is intended to take account of the fact that the proportion may vary between about 10% up to about 25%, but either of those is properly to be characterised as a substantial proportion. I am not convinced that the share of UK visitors to the South African sub-domain is significantly less than 10% or significantly more than 25%.
34. The next matter raised by Mr Ward is the “Terms and Conditions” and “Terms of Service” on the [REDACTED] website. They apply to the whole site, including all the sub-domains. They are as follows:

Terms and Conditions

“This site is operated from the United Kingdom. The courts of the United Kingdom shall have exclusive jurisdiction over all claims or disputes arising in relation to, out of or in connection with this website and its use and these terms.”

Terms of Service

[REDACTED] is owned and operated by [REDACTED] Ltd, a UK based company dedicated to providing a top quality, legal and ethical English escort website.”

35. Mr Ward submits these terms support his client’s case.
36. The final point is the structure and nature of the overall [REDACTED] site. Mr Ward submits that one can see from the content and structure of the site as a whole that truly this is a single entity albeit that it has sub-domains. The sub-domains are merely part of the whole website. This is not a series of unconnected local websites, it is intended to be and is a coherent global site. He contends that while there are local sub-domains which have a local emphasis, consistent with the overall global nature of the site, these local sub-domains are not exclusively targeted at the individual countries.
37. I have decided that Mr Ward’s submission is right. Looking at the [REDACTED] site as a whole and the sub-domains, it is not correct to analyse them as a series of separate national sites. In truth, this is a single global offering with national elements. One can infer from the content of the site that the operators intend that, for example, visitors from the UK will visit the South African sub-domain. The visitor figures bear this out.
38. I recognise that there is a significant local element to the content of the South African sub-domain. Mr Heald is right to emphasise that the services offered by the escorts

are obviously located in South Africa and the prices are in Rand and so on. However, although part of the way in which this website raises revenue is through selling premium advertising services to the escorts themselves, another important way in which the operators of the [REDACTED] website earn revenue is by generating traffic to the site and earning money from advertising. That traffic can be from anywhere in the world. It is therefore in the interests of the operators of the website that, for example, visitors from the UK will visit the South African sub-domain albeit that those visitors may only be doing that for the purposes of titillation.

39. Mr Ward speculated that some people may visit the South African sub-domain because they may be travelling from the UK to South Africa with a view to organising escort services when they arrive in South Africa. That is really speculation on Mr Ward's part. The important point is that in terms of advertising revenue the site benefits from traffic from the UK as much as traffic from South Africa.
40. It was common ground that mere accessibility on the internet is not enough to show infringement, otherwise every website would be potentially amenable to the jurisdiction of every country in the world. However, as Mr Ward submitted, a finding that this site is at least in part targeted to the UK is consistent with the purpose of that concept in copyright law. The way the site is constructed with a global front page will clearly attract users from many countries. The operators of the website intend that to be the case. There is nothing surprising about the fact that a substantial proportion of the visitors to the South African sub-domain are from the UK.
41. I find that the first defendant's [REDACTED] website and the sub-domain at [REDACTED] were communicating reproductions of the claimant's artistic works to the public in the UK. As a result the first defendant has infringed the claimant's copyright under section 20 of the Copyright Designs and Patents Act 1988.

Liability of second defendant

42. The second defendant contends he is not personally liable for the infringements carried out by the first defendant.
43. The claimant contends Mr Carter is liable, either directly on the basis that he is the person who authorised the infringing acts of communication to the public and therefore committed an infringing act on his own under s16(2) of the 1988 Act, or on the basis that he is jointly liable for those acts with the company.
44. Kitchin J as he then was considered the ambit of the tort of authorisation under s16 of the 1988 Act in *Twentieth Century Fox v Newzbin* [2010] EWHC 608 at paragraphs 85-95. Having considered the authorities, Kitchin J summarised the test in paragraph 90 as follows:

In my judgment it is clear from this passage that "authorise" means the grant or purported grant of the right to do the act complained of. It does not extend to mere enablement, assistance or even encouragement. The grant or purported grant to do the relevant act may be express or implied from all the relevant circumstances. In a case which involves an allegation of authorisation by supply, these circumstances may include the

nature of the relationship between the alleged authoriser and the primary infringer, whether the equipment or other material supplied constitutes the means used to infringe, whether it is inevitable it will be used to infringe, the degree of control which the supplier retains and whether he has taken any steps to prevent infringement. These are matters to be taken into account and may or may not be determinative depending upon all the other circumstances.

45. I will follow that approach.
46. As regards joint liability, Mr Ward submitted that the test explained in MCA v Charly Records [2002] FSR 26 (the judgment of Chadwick LJ) should be applied.
47. In order to analyse Mr Carter's position it is necessary to go into the facts in more detail. At the same time I will deal with Mr Carter's evidence that he gave in cross examination.
48. The evidence is that in about February 2012 Mr van Tonder had started working on a website in South Africa called [REDACTED]. It was to be an escort website. It would appear that this website already contained copies of the claimant's copyright works. I will refer to this as the first website.
49. Mr Carter is based in the UK. He works as a forklift truck driver at a warehouse for Tesco. In February/March 2012 Mr Carter was on holiday in South Africa and met Mr van Tonder at a party. They were chatting and Mr van Tonder discussed the website idea with Mr Carter. Mr van Tonder showed Mr Carter what he had developed and Mr Carter said he liked the idea. It appears that Mr van Tonder had some expertise in setting up websites.
50. Mr Carter's evidence is that nothing further came of that discussion but after he returned to the UK, in about April 2012, he had a Skype chat with Mr van Tonder. In that conversation, Mr van Tonder said he was still developing the first website and that it was coming on well but he needed some money. In the end Mr Carter transferred £3000 worth of South African Rand to Mr van Tonder through Mr Carter's family in South Africa.
51. He was asked about this in cross examination. Mr Carter's evidence was that he and Mr van Tonder had not agreed anything concrete at the time. In particular Mr Carter said they had not agreed anything about how any profit that might arise from this joint venture might be shared.
52. I find that at that time, Mr Carter and Mr van Tonder did agree to set up a website together with the money to come from Mr Carter and the work to be done by Mr van Tonder. I believe Mr Carter when he says that they had not agreed the terms. The sum of money was a relatively small sum from Mr Carter's point of view since he had recently sold his house and had the equity available in cash.
53. The next event was in June 2012. Mr van Tonder received a letter from the claimant's trademark attorneys in South Africa, DM Kisch Inc., dated 14 June 2012. The letter was addressed to an email address associated with the first website.

54. Mr van Tonder passed this to Mr Carter. A number of things then happened after the letter was received. Also on 14 June (but after the letter had been received) the [REDACTED] website was registered. By 20 June 2012 the first defendant company had been incorporated. It was clear that Mr van Tonder and Mr Carter had agreed that the [REDACTED] website would belong to the company and it was also clear that the company was to belong to Mr Carter. He would be the sole director and shareholder.
55. On 24th June 2012 the claimant's South African attorneys received a reply to their letter of 14th June. It is written on the first defendant's headed paper, giving an address in Surrey. The letter is signed by Mr Carter and states "*I have elected to respond in my personal capacity ...*". The letter makes an offer to settle and could perhaps have been regarded as "without prejudice" but it was put in evidence by Mr Carter, who has the benefit of solicitors and counsel representing him in this action.
56. Mr Carter suggested that there were good reasons for registering the company in the UK, because for example they felt a UK company portrayed a better image than a South African business. That may be so but in my judgment the predominant motives in the mind of Mr Carter and (as best I can infer it) the mind of Mr van Tonder, were the following. The company and the website were set up in direct response to the letter before action from the claimant's attorneys. The only rational explanation for this activity was that it was an attempt by Mr van Tonder and Mr Carter to seek to avoid liability in South Africa by moving the holding of the website off-shore from the point of view of South Africa to the UK. The reality was that Mr van Tonder retained practical responsibility for all the websites since he was the person with the technical ability to look after them, but it is clear that the two individuals agreed and intended that the new website would belong to the first defendant and be run through the first defendant.
57. Mr Carter and Mr van Tonder also agreed that Mr van Tonder would transfer the content of the first website to the new [REDACTED] website and get the [REDACTED] website up and running. Mr van Tonder did so. It was clear to both gentlemen that the only individual who could act for the company was Mr Carter. Therefore it was Mr Carter who instructed Mr van Tonder to transfer the first website into the new company based website. It is also clear that the purpose of this transfer was in order that the material which was on the first website would be placed on the [REDACTED] website in order for that website to operate as planned. The operation of the [REDACTED] website involves the acts of communication to the public in the manner I have addressed above. That is the purpose of a website and I am quite sure that Mr Carter and Mr van Tonder both intended that that is what would happen.
58. At this stage I infer that Mr Carter knew that the claimant contended that the content of the first website infringed its copyright. It is said by Mr Carter that the letter of 14th June 2012 was unspecific. That is true and it is also true that much of the letter is concerned with allegations of trade mark infringement. However it cannot be said that Mr Carter was unaware that the claimant was claiming that the first website infringed copyright. This point is advanced clearly in the letter. It is not a throw away remark.
59. In my judgment it cannot be said that Mr Carter instructed Mr van Tonder to transfer of the content of the first website to the [REDACTED] website without being on notice that there was a potential copyright claim. I infer that the first defendant company

was set up in order to try and shelter any liability, including liability for copyright infringement, from the South African jurisdiction. It may be that Mr Carter has been naïve in this respect but whether naïve or not, it is plain that he directed the transfer of the first website's content to the [REDACTED] website with a view to that content being communicated to the public.

60. It is clear that it was Mr van Tonder who actually transferred the content to the [REDACTED] website and set up that website in such a way that the servers on which it resides communicate its contents to the public. In carrying this out Mr van Tonder was acting on behalf of the first defendant on the express or implicit instructions of Mr Carter. Bearing in mind *Twentieth Century Fox*, it seems to me that Mr Carter's actions amount to an authorisation by him personally to Mr van Tonder to carry out the infringing acts.
61. I will also consider whether Mr Carter is liable for the infringements committed by the first defendant company as a joint tortfeasor.
62. Mr Heald referred to the judgment of Peter Gibson LJ in *Sabaf v Meneghetti* [2002] EWCA Civ 976 at paragraph 59:
- “The underlying concept for joint tortfeasors must be that the joint tortfeasor has been so involved in the commission of the tort as to make himself liable for the tort. Unless he has made the infringing act his own, he has not himself committed the tort. That notion seems to us what underlies all the decisions to which we were referred. If there was a common design or concerted action or otherwise a combination to secure the doing of the infringing acts, then each of the combiners has made the act his own and will be liable.”
63. Mr Heald also submitted that *MCA v Charly* shows that the fact that a person is a director or controlling shareholder is of little or no relevance to the question of whether he is jointly liable. A person is entitled to rely upon the fact that they have done no more than exercise their constitutional role as a defence.
64. In other cases these principles may assist a company director but in my judgment they do not assist Mr Carter in this case. Mr Carter is the only person through whom the company could act in any way at all. He knew that the first website was alleged to infringe both copyright and registered trademarks. I recognise that the copyright claim was unspecific but there are steps that could have been taken at the time to find out more about that if he had been concerned about it. He agreed with Mr van Tonder to set up the new website in the company's name and that is what happened. It would be unreal to find that Mr Carter is not personally liable for the infringements committed by this company.
65. In the course of discussion with Mr Heald, the possibility was suggested that in fact everything that had occurred had been set up by Mr van Tonder to exclude him from liability and that the fact that Mr Carter was the fall guy should not make him liable. Characterising Mr Carter as the “fall guy” may well come quite close to the mark in some respects. The only way some of the evidence make much sense, in the complete absence of disclosure and some of the vague answers from Mr Carter in cross

examination, is if the real brains behind this scheme is Mr van Tonder. Perhaps Mr Carter has been somewhat naïve but, as Mr Ward pointed out, that suggestion is not in Mr Carter's evidence. His witness statement and his oral testimony at face value do not support this proposition. I infer that Mr Carter has always known, or ought to have known, what he was getting himself into.

66. For these reasons I find for the claimant in this case.