Neutral Citation Number: [2013] EWHC 1630 (Comm)

Case No: 2012-834

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 12/06/2013

Before:
Mr Justice Andrew Smith

- -

Between :

(1) Dar Al Arkan Real Estate Development Company **(2) Bank Alkhair B.S.C.**	**Claimants**
and	
(1) Majid Al-Sayed Bader Hashim Al Refai **(2) Kroll Associates U.K. Limited** **(3) Alexander Richardson** **(4) FTI Consulting Group Limited**	**Defendants**

- -
- -

Mark Warby QC, Richard Munden and Rosanna Foskett
(instructed by **Dechert LLP**) for the **Claimants**

Richard Spearman QC and Godwin Busuttil
(instructed by **Stephenson Harwood LLP**) for the **Fourth Defendants**

Hearing date: 20 May 2013

- -

Judgment

Mr Justice Andrew Smith:

1. The fourth defendants, FTI Consulting Group Limited ("FTI"), apply under part 3.4(2) of the Civil Procedure Rules ("CPR") to strike out part of the case brought against them and under CPR 24.2 to obtain summary judgment on certain issues. The applications are resisted by the claimants, the other defendants making no representations on them. Although applications have been brought under both part 3 and part 24 of the CPR (which is a current fashion), they turn on the same arguments, and it is convenient to consider them by reference simply to the application for summary judgment. It was not suggested by Mr Richard Spearman QC, who represented FTI, that they could succeed under CPR part 3 if they are not entitled to summary judgment. Further, when asked for a precise formulation of the order sought under CPR part 3, FTI produced a draft not only striking out parts of the particulars of claim but also adding words qualifying some of the claimants' pleaded allegations. This was presented only after the hearing, and the claimants had had no notice of it. I know of no precedent for such an order, and I did not receive

submissions about whether the court has such power under CPR part 3 or otherwise (although I dare say that the intended purpose could be achieved by some other route).

2. I shall therefore consider whether the claimants have any real prospect of succeeding against FTI on the claims and issues on which FTI seek summary judgment and whether there is any other compelling reason why the claims and issues should be disposed of at a trial. The main target of the applications is the claimants' contention that FTI (with the other defendants) are responsible for publishing criticisms of them on a website and in an email. This contention gives rise to claims of defamation and malicious falsehood, and is also relied upon in support of claims of breach of confidence, conspiracy, procuring breach of contract and unlawful interference with business.

3. Both Mr Spearman and Mr Mark Warby QC, who represented the claimants, cited authorities in which courts have explained the nature of the summary judgment procedure and how it applies in particular cases. I do not attempt my own exposition, and it suffices to say that I seek to apply the principles formulated by Lewison J in Easyair Limited v Opal Telecom Limited, [2009] EWHC 339 (Ch) at paragraph 15 and by Hamblen J in Credit Suisse International v Ramit Plana OOD, [2010] EWHC 2759 (Comm) at paragraphs 23 to 25. I add these observations of particular relevance here:

   i) The thrust of the claimants' complaint in this litigation is that the defendants worked together secretly to damage their reputation and so their business. On a summary judgment application the court is not blind to claimants' difficulties in such cases of producing solid evidence of the role of each defendant in covert activities, particularly before disclosure. (In this case the defendants have provided copies of many documents pursuant to orders made by Popplewell J in June and July 2012, but this does not amount to disclosure, in particular of documents passing between defendants.) The point was made by Morritt C in Toshiba Carrier UK Limited v KME Yorkshire Limited, [2011] EWHC 2665 (Ch), whose judgment was upheld in the Court of Appeal at [2012] EWCA Civ 1190:

      > "There is no evidence from the claimants in response to that of [the defendants' witnesses who deny involvement]. But there has been no disclosure. As the Court of Appeal pointed out in [Cooper Tire & Rubber Company Europe Limited v Shell Chemicals UK Limited, [2010] EWCA Civ 864 at para 43] the strength of the claimants' case cannot be assessed, let alone particularised, until after disclosure of documents. The fact that the claimants do not now have evidence to refute that of [the defendants' witnesses] does not enable me to conduct a mini-trial, let alone, predict the outcome of the actual trial."

   ii) In so far as the claimants contend that FTI are liable as parties to a common design pursuant to which tortious acts were directly done by others, the courts are always cautious about giving summary judgment where the common law is less than clear, at least if the facts are uncertain: it is generally preferable for

the law to be developed when the actual facts of the particular case have been fully established.

iii) As I have said, FTI are not seeking summary determination of the whole of the case against them, but of some of the claims and of certain issues. All the claims in these proceedings are inter-related. Although it can sometimes be useful to determine summarily individual parts of a claim, it is important that what is determined be sufficiently distinct from what remains to be tried to avoid the risk that the trial of other issues is artificially or unfairly distorted and for individual issues to be determined discretely.

iv) On the other hand, FTI have been brought into a major piece of litigation, which is being pursued vigorously by the claimants with no apparent concern about the costs generated. Despite being reduced in length following court orders, the claimants' statement of case runs to 98 pages, leaving aside its 11 annexes and 20 schedules. The defendants have responded in kind: the first defendant, Mr Al Refai, with statement of case of 90 pages and a long annex; the second defendants, Kroll Associates UK Limited ("Kroll"), with a statement of case of 278 pages, plus annexes; and the third defendant, Mr Richardson, with a statement of case of 180 pages plus annexes. It might be that through case management the court will have the parties to produce statements that provide proper assistance to identify the issues, but that is for the future. I sympathise with the wish of FTI, who have limited their defence to a mere 40 pages, to avoid being drawn further into this dispute than is properly justified.

4. The first claimants, Dar Al Arken Real Estate Development Company ("DAAR"), a Saudi Arabian property development company, and the second claimants, Bank Alkhair BSC(c) ("BA"), a Bahraini registered investment bank, have common shareholders and directors, including Sheikh Yousef Al Shelash ("Sheikh Yousef"), who is chairman of them both. According to the claimants' pleading, "BA benefits in part from the custom of DAAR and at all material times had a legitimate trade and commercial interest in its financial wellbeing; and vice versa". Until August 2010 Mr Al Refai was the Chief Executive Officer and the Managing Director of BA. He has since his dismissal been involved in a protracted and apparently bitter dispute with them, involving criminal and civil proceedings in Bahrain. He has been convicted in his absence by the Bahraini courts of offences including embezzlement and misuse of BA's funds, destruction of their documents, forgery and money laundering.

5. The claimants allege that, having been dismissed, Mr Al Refai has borne a grudge against them and waged a campaign with the intention of injuring them, their reputations and their business interests; and to this end in about August 2010 he engaged the services of Mr Richardson, a chartered accountant who practises in Bahrain; in around November 2010 he engaged the services of Kroll, who provide investigatory, business intelligence and other services; and in around June 2011 FTI, who provide public relations services, were "engaged as part of the campaign".

6. The claimants' pleading identifies three stages in the defendants' activities: in the first, from November 2010 to early July 2011, in which FTI are not said to have been

involved, it is alleged that a strategy was developed to ascertain BA's funding position, information confidential to BA was exchanged and the defendants' activities then "extended to meeting with and providing information to third parties such as financial institutions such as financial institutions, rating agencies and financial journalists with an interest in the Claimants". The complaint against FTI is that they became involved in the second phase of the activities, when the defendants "turned their attention to disseminating information more widely". It is pleaded (at paragraph 72 of the amended particulars of claim):

> "Due to the fact that FTI was engaged as part of the campaign in around June 2011 (and not at a later stage), was involved in communications with the other Defendants from that time, and was remunerated by Mr. Al Refai on a regular basis from July 2011, it is inferred and alleged that by at least the commencement of this phase FTI was actively involved with the development and implementation of the campaign. It is inferred and alleged that FTI had been informed at least in broad terms by the other Defendants of the strategy which had been outlined in the Counter-attack Strategy [produced by Mr Richardson] and Updated Counter-attack Strategy [produced by Mr Al Refai or his personal assistant] and which they had been pursuing."

There is no dispute that in August 2011 Mr John Hobday, a Senior Managing Director of FTI, discussed (according to FTI, briefly) with Mr Al Refai, Mr Richardson and Mr Everett-Heath of Kroll the possibility that the internet might be used "to get out into the public domain Mr Al Refai's side of the story" (as Mr Hobday put it in a witness statement dated 5 February 2013), and suggested that a blog might be used for this purpose. He was told that Mr Al-Refai had "information in his possession that was adverse to the Claimants", but he denied being provided with the information itself.

7. In the third stage of the campaign from 28 February 2012, the defendants are said to have launched a website to publish allegations defamatory to the claimants and malicious falsehoods about them and to make public information confidential to BA, including, it is said, information that fell within the definition of "Proprietary Information" in Mr Al Refai's employment contract with BA and that he was obliged under the terms of the contract to keep confidential. On about 28 February 2012, as the claimants allege and as is not disputed for present purposes, a website was opened under the name of "daralarkancrisis.com" (the "Website"), and it remained accessible, except in Bahrain and the Kingdom of Saudi Arabia, until after these proceedings were brought. The claimants also allege that in this third stage there was "circulated and published extensively amongst those involved in finance" an email (the "Email") in similar if not identical terms to one apparently received by Mr Al Refai, dated 28 February 2012 and headed "Dar Al Arkan Funding Crisis". It purported to draw attention to matters concerning "the financial health, corporate governance and managerial integrity" of DAAR, and then referred to the Website: it is, the claimants allege, defamatory of DAAR and constitutes a malicious falsehood against them.

8. According to Mr Hobday, the Website was widely publicised through the Email and coverage of, for example, Reuters and Bloomberg, in which he was not involved: on

29 February 2012 DAAR themselves issued a press release commenting on the Website. However, FTI accept that after the Website was launched they gave advice to Mr Al Refai about it. On 4 March 2012 Mr Hobday took part in a conference call with the other defendants and was asked about interesting the media in the Website. He advised that it was too complex to attract the press, and suggested a summary of key points that journalists might research further. Mr Richardson, as Mr Hobday's account continued, offered to prepare one, and produced on 5 March 2012 a statement of key points from the Website that Mr Hobday provided to journalists, suggesting that they might warrant further consideration and investigation.

9. The claimants have asserted against FTI six causes of action: conspiracy to injure using unlawful means; conspiracy with the predominant purpose of causing injury; procuring breach by Mr Al Refai of his contract of employment; a tort of unlawful interference with business or commercial interests, or, as it is sometimes called, of causing loss by unlawful means; defamation; and malicious falsehood. The claimants have not yet quantified their claim, but have estimated their losses in hundreds of millions of dollars.

10. The focus of FTI's applications is the claimants' contentions that they are liable in respect of the defamatory material on the Website and in the Email and in respect of the alleged malicious falsehoods that they contained. Their contentions in respect of the defamations are pleaded in these terms in paragraphs 154 and 164 of the amended particulars of claim (and the allegations about the malicious falsehood claims are materially similar):

> "On or about 28 February 2012 the Defendants and each of them, alternatively one or more of them wrote and published or caused or authorised to be written and published in the manner and to the extent identified … below the Email, …"
>
> "From about 28 February 2012 until about June 2012, via [the Website] and from about 24 April 2012 to about 4 August 2012 on and via [another website], the Defendants and each of them, alternatively one or more of them, wrote and published or caused or authorised to be written and published [words said to be defamatory]."

11. Mr Warby made clear in his oral submissions that the essential part of these allegations as far as FTI are concerned is that they are liable because they "caused" the material to be published. He also accepted that the claimants have not pleaded a case that FTI are liable for publication of the material by way of drawing the Website to the attention of persons involved in finance or others, or encouraging others to read it.

12. I must refer in some detail to the evidence (i) about Mr Hobday's involvement with other defendants in and about August 2011, upon which the claimants particularly rely, and (ii) about Mr Hobday's involvement when the Website was launched at the end of February 2012, which is the lynchpin of FTI's arguments. As well as the pleadings (the amended particulars of claim and the defences of FTI and the other defendants), the relevant material includes these witness statements:

i) One dated 16 July 2012 and made by Ms Kelly Hagedorn, a solicitor in Dechert LLP, the claimants' solicitors, which she made in support of an application to join FTI as defendants in the proceedings and for injunctive relief against them.

ii) A witness statement dated 5 February 2013 and made by Mr Hobday, which was made in the context of a contested application by the claimants to amend their particulars of claim, in order, he said, that the court should have "a basic understanding of [FTI's] factual position".

iii) A second witness statement of Ms Hagedorn dated 28 March 2013 in response to these applications.

iv) A second witness statement of Mr Hobday dated 14 April 2013 and made in order to respond to points made by Ms Hagedorn in her second witness statement.

13. Mr Hobday said in his first witness statement that in June 2011 FTI were engaged by Mr Al Refai to provide public relations advice and other media-related services, and within FTI he was principally responsible for the engagement. He accepted that, as I have indicated, he "briefly discussed with Mr Al Refai, Mr Everett-Heath and Mr Richardson in early August 2011 the possibility of using the internet to get out into the public domain Mr Al Refai's side of the story" and suggested that a blog might be a good way of doing so, but he denied that he had anything "to do with the creation or composition of the Website … at the heart of the litigation". He was told, he said, that Mr Al Refai had "unspecified information … that was adverse to the Claimants", but was not provided with the information and Mr Hobday described the discussion as "merely theoretical" as far as he was concerned. He then "raised with an IT colleague in FTI's digital division in the US the possibility of using the internet to put this information into the public domain", but was told that FTI did not undertake such work and would not wish to be involved in it: he conveyed this to Mr Everett-Heath on about 9 August 2011. Nevertheless, "shortly afterwards", Mr Hobday said, he was party to the further telephone conversation with Mr Al Refai, Mr Everett-Heath and Mr Richardson in which Mr Everett-Heath said that he was going to "put together a draft structure for a website".

14. According to Mr Hobday, he was next involved in exchanges about the internet on 29 August 2011 when in advance of a further conference call on 30 August 2011 he received from Mr Everett-Heath an email: it has been labelled the "Cardiff dairy" email, because it set out a proposal by presenting a template for a website supposedly prepared by "shareholders and stakeholders in, and counterparties of" a fictitious company given the name "Forwardpass" and the description of a Cardiff-based dairy company (clearly a fiction designed to preserve confidentiality in the event of third parties reading the email). It presented what was described as "a short sketch" that Mr Everett-Heath hoped might provide a "starting point for our all call tomorrow" (an "all call" being, I would suppose, a conference call). The short sketch suggested, as it appears, a website with a homepage "neutral in tone and style: seeking to have a sense of seriousness and avoiding either sensationalism and/or gimickiness", and an explanation that those who had prepared the "archive of documents" available through it had the aim of "counterbalanc[ing] failures of disclosure on the part of

Forwardpass's management, which have culminated in regulatory breaches, false representations and fraud, and the destruction of economic value for investors in the business". It encouraged others to submit evidence of "wrong-doing, malpractice or inappropriate conduct on behalf of the senior management or owners" of the company. It then presented in separate paragraphs the "key themes" of wrongdoing, giving as examples (i) failure to disclose the source of revenues, (ii) falsification of financial results, and (iii) a failure to disclose convictions of or actions against the company's senior management. It was envisaged that a hyperlink would take the reader to further details of each "key theme", the one about the company's sources of revenue describing the true sources as "haram activities", and thence further hyperlinks would take the reader to documents supporting each allegation.

15. On 30 August 2011 Mr Hobday took part in the planned conference call, and agreed that a website might in principle be structured as Mr Everett-Heath suggested. He described the discussion as still "in the abstract" and, from his point of view, "hypothetical", and said that he had not been provided with the material that Mr Al Refai planned to make public through the internet; and that thereafter he had no further discussions with any of the defendants about creating a blog or a website and knew nothing of other defendants doing so.

16. The claimants plead that the template was "somewhat similar in structure" to that of the Website. Although FTI (unlike Mr Richardson) do not admit this in their defence, Mr Spearman did not dispute on these applications that there were significant similarities between the template and the Website or suggest that they were coincidental. The claimants have a sufficient case for present purposes that the Website was a development from the template suggested in the Cardiff dairy email. Mr Warby identified these features:

    i) The presentation of what purported to be an "archive of documents … prepared by shareholders and stakeholders".

    ii) The use of the Arabic term "haram" (or forbidden) to describe business that was said not to have been disclosed, an odd description of the activities of a company based in Wales.

    iii) Contemplated allegations of falsification of financial results, breaches of accounting standards and deliberate misrepresentation of the balance sheet.

    iv) The structure of links to documents supporting (or presented as supporting) the allegations.

    v) An apparent tone of neutrality and seriousness.

17. The claimants contend that Mr Hobday's account of his involvement with the proposal for a website demonstrably lacks candour. I am not impressed by that submission. Mr Warby's points were these:

    i) First he criticised Mr Hobday for referring to "brief" discussions in his first witness statement, contending that the accounts of other defendants indicate more extensive discussions. However, Mr Hobday was describing as "brief"

only the exchanges in early August, and he went on to describe his further discussions later that month.

ii) Secondly, he criticised Mr Hobday for describing the purpose of being to get "into the public domain Mr Al Refai's side of the story", because he was dealing with material "adverse to the claimants". This is a false dichotomy. Mr Al Refai's side of the story involved attacking the claimants.

iii) Mr Warby observed that Mr Hobday referred in his first witness statement to the discussion on 30 August 2011 about a possible website, and submitted that there must have been further prior discussions about this. Even if there were, I do not understand why it is assumed that Mr Hobday (or FTI) was party to them.

iv) Mr Richardson pleads in his defence that "In or around the end of August or beginning of September 2011, FTI informed the Defendants that they could not put up the Website that had been discussed". Mr Warby submitted that this is inconsistent with Mr Hobday's evidence that he conveyed to Mr Everett-Heath on or about 9 August 2011 that FTI would not wish to be involved with Mr Al Refai using the internet for the purpose discussed, and that "shortly afterwards" and before 29 August 2011 he participated in a conference call with the other defendants including Mr Richardson. There is, I accept, tension between these accounts but it does not seem to me a particularly remarkable inconsistency or to indicate that either Mr Hobday or Mr Richardson is guilty of more than mis-remembering the precise timing of these events. In any event, Mr Warby had no basis for supposing that Mr Hobday rather than Mr Richardson was in error, still less that he was lacking in candour.

v) Finally, reference was made to FTI's publicity materials in which they present their services as including promotion through the internet, and this was said to cast doubt on Mr Hobday's evidence that FTI's IT department told him that FTI would not undertake the proposed work to create a website. However, to my mind what was proposed was very different from an ordinary website promoting a business.

18. Mr Hobday's evidence was that the launch of the Website in February 2012 was a surprise to him, and Mr Spearman submitted that this is clearly reflected in email exchanges in which he was involved. On 28 February 2012 Mr Al Refai forwarded to him the Email under cover of the following: "You're not going to believe what I received by email. Please review then we may want to discuss some kind of strategy, plan media response, etc". Mr Hobday replied that he was out to dinner but had "scanned this email. Wow!", and said that they should "chat tomorrow". Mr Hobday said in his first witness statement that the wording used by Mr Al Refai "suggested that he had nothing to do with the website and [he] saw no reason to question him about it based on what he had said in his email …".

19. On 29 February 2012 Mr Hobday recited an email from Bloomberg forwarding DAAR's response to the Website, commenting that DAAR were "blaming Al Refai". Mr Hobday sent it on to Mr Al Refai, suggesting that "we need lawyers on stand-by",

and also sent a draft statement denying that Mr Al Refai did not "create, contribute to, or instigate" the Website. On 5 March 2012 Mr Hobday wrote to Mr Al Refai, Mr Everett-Heath and Mr Richardson about a report in the Bahraini newspaper, Akber Al-Khajeer, in the following terms (referring to Mr Al Refai as Majed):

> "All, just spoke with Majed. [DAAR's] statement has appeared in full in Akber Al Khafleej of Bahrain. They did not feel the need to check facts. They include the accusation that the site is of Majed's Invention. We think it's great every time the press mentions the Website, but do need to be clear it is not down to Majed. So, we need to agree a statement asap.
>
> I'm now out of contact for the next 9 hours but can [Mr Richardson and Mr Everett-Heath] agree something based on the below for Majed to check with lawyers? Our obj[ect] is to say we didn't do it, but you need to check the site.
>
> Statement 'Majed Al Refai did not create, contribute to, or instigate the daralarkan-crisis.com website. Like many other affected and concerned parties, he has studied it with interest and shares many concerns raised by the website about [DAAR] & Yousef Al Shelash, their Related Parties and alleged fraudulent activity and suggests investors, bondholders and other interested parties read daralarkan-crisis.com and form their own opinion on the integrity of the considerable information it contains.'"

20. Mr Richardson responded on 6 March 2012. He said that he was "not entirely sure whether we should even respond with a denial to the new press release by [Sheikh Yousef] as responding directly to it possibly gives it some degree of credence". Further emails show that thereafter Mr Hobday's involvement with the Website was consistent with FTI being engaged by Mr Al Refai as a public relations adviser, for example by trying to attract media interest in Mr Richardson's summary of points from it. Nothing in them indicates that Mr Hobday (or anyone at FTI) had any involvement in creating or launching the Website.

21. Mr Spearman contended that these exchanges are consistent only with Mr Hobday being unaware that Mr Al Refai was involved with the Website, and are therefore inconsistent with him being party with Mr Al Refai in writing or launching it, unless the exchanges were concocted in order to create a false impression. In the end, Mr Warby acknowledged that he could suggest no other explanation for them. Moreover, according to Mr Hobday he first learned of the possibility that Mr Al Refai's correspondence might have been hacked only on 28 March 2012, when he received an email that he should not open correspondence from Mr Al Refai's address because of such suspicions. No evidence indicates that he had had reason to suspect this earlier. In these circumstances, Mr Spearman argued, it cannot realistically be supposed that the email exchanges were an elaborate charade, and the claimants do not plead, and before the hearing of these applications had not asserted, that they

were. According, it is said, the only realistic inference is that they demonstrate that FTI were not party to the launch of the website.

22. I do not accept that, as Mr Spearman submitted, it is not open to the claimants to suggest that the exchanges were a concocted charade because they have not pleaded such an allegation: the claimants do not rely on that allegation to support any of their claims, and they are not obliged to plead what evidence might support their contentions, still less to plead in their particulars of claim how they might refute evidence on which defendants might rely. (Indeed, I have struggled in previous hearings in this case with only limited success to curtail the claimants' pleading, which is, to my mind, still disappointingly long, and I certainly discourage them from extending it unnecessarily.) Even if the claimants' pleading were defective in this way, I would not decide these applications on such a technical point without affording the opportunity to remedy the defect.

23. However, FTI's argument based on these exchanges remains, I recognise, a powerful one. On the face of it, it does seem improbable that Mr Hobday and others would engage in such an elaborate subterfuge to protect FTI, the more so because Kroll and Mr Richardson have not sought to deny their own involvement with the Website. However, this must be balanced against two considerations. First, on any view the exchanges cannot all be accepted at face value: it seems that Mr Richardson dissembled in his reply of 6 March 2012 in that he admits in his defence that he, Mr Al Refai and Kroll together launched the Website. Of course, this leads to the question whether Mr Richardson was misleading Mr Hobday rather than (or as well as) third parties who might come to have sight of his email, but it is a warning against assuming the exchanges are all what they seem to be.

24. Secondly, and more importantly, there is a key aspect of Mr Hobday's account that strikes me as curious: he does not say that he was ever told by Mr Al Refai, Mr Everett-Heath or Mr Richardson that they had nothing to do with writing and launching the Website. Further, although he does not say so in terms, he must have seen the Website, understood its structure and read at least a considerable part of its contents: otherwise he would not have advised that it was too complex to interest journalists. It might be thought that he would have recognised its similarities to what was suggested by Mr Everett-Heath in August 2011. Nevertheless, as far as his evidence goes, he never asked anyone about who might be behind the Website. Instead, his account is that he always acted on the assumption that he formed from Mr Al Refai's email of 28 February 2012 that Mr Al Refai had nothing to do with it, and apparently also assuming that Mr Richardson and Mr Everett-Heath had nothing to do with it either. He does not say whether he did not recognise similarities with Mr Everett Heath's template or he attributed them to coincidence. Particularly given that Mr Hobday has had over 15 years' experience in financial and corporate communications, I see force in Mr Warby's submission that in these circumstances the claimants should be allowed to test his account at trial.

25. However, Mr Spearman has other arguments. First, Mr Hobday asserts unequivocally that he had nothing whatever to do with the creation or composition of the Website, and that his account is essentially that in FTI's letter dated 19 July 2012 responding to Ms Hagedorn's first witness statement. Secondly, Mr Spearman observed rightly that the thrust of the claimants' complaint against FTI has changed since they were joined

in the proceedings: Ms Hagedorn stated in her witness statement of 16 July 2012 that the claimants believed that "it is highly likely that FTI is in possession of Proprietary Information" and also, I think it fair to add, their confidential information. That allegation is no longer pursued. Thirdly, it is said that the invoices submitted by FTI are, at the least, consistent with Mr Hobday's account. Fourthly, FTI's position is, in my judgment, supported by the pleading of the other defendants. I should expand upon the last two points.

26. FTI's fees shown on their monthly invoices to March 2012 are these:

July 2011: $3,250.00 for 6.5 hours worked by Mr Hobday

August 2011: $5,700, of which $3,750 was for 7.5 hours worked by Mr Hobday.

September 2011: $8,796.94, of which $4,000 was for 8 hours worked by Mr Hobday.

October 2011: $1,908, of which $1,500 was for 3 hours worked by Mr Hobday.

November 2011: $408, none of which was for Mr Hobday's work.

December 2011: $2,058, of which $750 was for 1.5 hours worked by Mr Hobday.

February 2012: $1,838.21, of which $750 is for 1.5 hours worked by Mr Hobday on 29 February 2012.

March 2012: $2,158, of which $1,750 is for 3.5 hours worked by Mr Hobday.

There was apparently no invoice for January 2012. Although Mr Warby raised questions about the details of the invoices (and in particular I accept his observation that the March 2012 statement charges curiously little time for Mr Hobday), the general pattern is that Mr Hobday did not charge for work for Mr Al Refai in the months before the launch of the Website and, had he been involved in the launch, he would surely have done so. The invoices indicate that, after giving advice in August and September 2011, FTI had little involvement with Mr Al Refai until after the Website was launched. (I mention in passing that Mr Hobday's evidence was that FTI billed Mr Al Refai a total of $25,350 in fees for his advice, for communicating with, in particular, journalists and for work on press cuttings. In fact, he exhibited invoices for just over $30,000 for the period from July 2011 to June 2012, Mr Warby took no point on that and the apparent discrepancy was not explored.)

27. What of the defences of the other defendants? I do not propose to refer to all the passages in them on which Mr Spearman relied: in general terms I accept his submission that the impact of the defences of Mr Al Refai, Kroll and Mr Richardson is that their case is that FTI were not involved with sending the Email or creating the Website. The following illustrations suffice:

i) Mr Al Refai has pleaded that in August 2011 he decided to prepare the Website for launch, and Kroll put Mr Richardson in touch with a web designer called "Neil", and Mr Richardson, as instructed, worked on the design and content. He pleaded that his discussions about its "technical set-up, functionality and content" were with Kroll and Mr Richardson. As for FTI,

in response to the claimants' allegation that they were "actively participating in the campaign" by July or August 2011, he pleaded that "FTI were only involved from the point of view of providing any media and public relations advice".

ii) Mr Richardson has pleaded in some detail about the discussions in August 2011. He said that FTI were made aware of "certain elements" in documents prepared by way of a strategy to be adopted against the claimants or in response to criticisms of Mr Al Refai, and that in or around early August 2011 the defendants discussed "possible ways to blow the whistle on [Sheikh Yousef] and the Claimants' wrongdoings", in the context of which Mr Hobday suggested that "an anonymous website might be used to expose the wrongdoing …"; but "In or around the end of August or beginning of September 2011, FTI informed the Defendants that they could not put up the Website that had been discussed". Mr Richardson went on to plead specifically that "Following this, FTI had no further involvement in the Website …The other Defendants continued to explore the Website idea further, and over the following months until February 2012 when the Website went live, they worked upon writing its contents and arranging the logistics for putting the site online. ..".

iii) Kroll's defence is less specific about whether FTI were involved in launching the website, but there is certainly no support for the claimants' case that they were: as Mr Spearman put it, that suggestion is conspicuous by its absence.

28. The claimants argued that parts of the defences of other defendants support their case against FTI. In particular, they said that Mr Al Refai and Mr Richardson have admitted their pleaded allegation that "Kroll, Mr Richardson and FTI knew that Mr Al Refai was one of the persons involved in the creation and launch of the Website but intended to seek to distance Mr Al Refai publically from it". Mr Al Refai's solicitors have written a letter explaining that, in so far as it related to FTI, the admission of knowledge that Mr Al Refai was behind the Website was not intended. I see no proper reason to doubt that: it is not unusual, in my experience, when pleadings are as long and convoluted as the claimants' for those responding to them to make an occasional mistake. Mr Richardson's solicitors contend that his defence is misunderstood. I do not propose to examine whether the claimants' understanding of Mr Richardson's defence is correct, because, even if it is, I would attach no more significance to it than to the admitted slip in Mr Al Refai's pleading. The general thrust of all the other defendants' pleadings to my mind supports FTI's arguments on these applications.

29. The claimants put forward two answers to FTI's denial of responsibility for the publication on the Website:

i) That, even accepting the general thrust of Mr Hobday's account, they have a sufficient argument for present purposes that FTI were joint tortfeasors with the other defendants in respect of the defamatory material on the Website and the associated malicious falsehoods.

ii) That there is sufficient reason to think that FTI's involvement with the other defendants in relation to the Website went further than Mr Hobday has acknowledged.

30. In Fish & Fish Limited v Sea Shepherd UK, [2013] EWCA Civ 544 the Court of Appeal considered the circumstances in which a person (a "participator") is liable for a tort directly committed by another (a "perpetrator") because he was party to a common design with the perpetrator (or concerted action with him). Beatson LJ identified and considered (at paragraphs 45ff) two requirements: (i) that there be a common design that at least one of the putative joint tortfeasors should do the act(s) said to be tortious to which "the actual perpetrator or perpetrators" was or were party (or, I would suggest, *an* actual perpetrator was party), and (ii) the participator did an act or acts in furtherance of the common design which was or were more than de minimis and did not merely facilitate the tort, without it being necessary that the participator did something "essential" or "of real significance" to the commission of the tort. In this case, Mr Warby submitted, there was a common design to which FTI (through Mr Hobday) were party together with the other defendants to disseminate information adverse to and defamatory of the claimants through a website, and pursuant to the common design, the intention of which was that the information should not merely be posted on a website but should "reach its audience", FTI were to be involved in promoting media interest in the website. In fact, Mr Warby added, by the end of August 2011 (after the Cardiff dairy email and the telephone discussion of it the next day) the common design had developed into a plan for a website along the lines of that eventually launched.

31. Mr Spearman submitted that the claimants have not so pleaded their case, and this was not how the claimants presented their case in the skeleton argument for these applications. The second point is justified: originally the thrust of the claimants' argument was that FTI "procured and/or participated in the publication" of the Website and also the Email: their position developed through the dialectic of the hearing and also, I would suppose, when the Court of Appeal delivered their judgments in the Fish & Fish case very shortly before the hearing. But that is of no consequence. The complaint about the pleading is, to my mind, more debatable: the claimants do plead that the defendants, including FTI, "wrongfully agreed, combined or reached a common understanding that they would operate and orchestrate a campaign to damage and harm the Claimants …" and that "The overt acts carried out pursuant to the said conspiracy" included the launch of the Website and FTI's involvement in "an orchestrated campaign designed to disseminate, publish and promote to as many third parties with influence in the financial markets as possible, the existence and contents of the Website, with the intention (predominant or otherwise) of injuring the Claimants". This pleading is presented as part of a claim in conspiracy, but it also sets out the factual basis for a claim against FTI as a joint tortfeasor. I am prepared to receive further submissions about whether the allegation of liability as a joint tortfeasor is adequately covered by the amended particulars of claim, but in any case I would not grant these applications on the basis of a finely balanced pleading point of this kind.

32. However, Mr Spearman also argued that the discussions in August 2011 are not a sufficient basis to make FTI responsible for the publications on the Website and through the Email in February 2012. He submitted

i) That FTI made clear that they would not be involved with developing the Website at a time when "the specific words of which [the claimants] complain in these proceedings as defamatory of them and as malicious falsehood had yet to crystallise",

ii) That the Website contained allegations which were "radically different from and wider than those contemplated by [the attachment to the Cardiff dairy email]", and which relate to DAAR as well as BA.

A claim in defamation rests on publication (not on merely "issuing defamatory words") and, FTI contended, what matters is whether FTI were responsible for "publishing *the specific defamatory words of which complaint is made"*. FTI relied upon the judgment of Eady J in Bunt v Tilley, [2006] EWHC (QB) 407, including his statement at paragraph 23 that "for a person to be held responsible there must be knowing involvement in the process of publication of *the relevant words*", and upon the general endorsement of Eady J's analysis in Tamiz v Google Inc, [2013] EWCA Civ 56, in which Richards LJ said that in that Google Inc, the operator of Blogger.com, had "allowed defamatory material to remain on a Blogger blog after it had been notified of the presence of that material, it might be inferred to have associated itself with, and to have made itself responsible for, the continued presence of the material on the blog and thereby have become a publisher of the material". Liability, Mr Spearman submitted, depends on knowledge of and control over the publication (or continuing publication) of the specific defamatory words complained of.

33. Thus, FTI's main answer to the case that they are liable to the claimants as joint tortfeasors in accordance with the principles explained in Fish & Fish was that they were not party to a common design to publish the specific words of which complaint is made and FTI did nothing in furtherance of a common design to publish those words; and the claimants have no real chance of showing otherwise. They described the knowledge and role of Mr Hobday as "too vague, general and remote to provide a basis for a claim of joint tortfeasorship against [FTI], whether by amounting to "concerted action to a concerted end" or at all", the expression "concerted action to a concerted end" deriving from the judgment of Scrutton LJ in The "Koursk", [1924] P 140,156.

34. I am not persuaded by these submissions that the issue about whether FTI are responsible for the publication on the website can be determined summarily in their favour. More specifically, I am not persuaded that it is fatal to the claimants that they do not allege (as Mr Warby acknowledges) that FTI knew of the precise words complained of before they were published. Cases of long-standing authorities adequately demonstrate this, and I cite two of them:

i) In R v Cooper, (1846) 8 QB 533 the defendant had asked a newspaper editor to "shew up" the Rev Joshua King and communicated a story to him. The editor passed it to a reporter in substantially the same terms, and the reporter wrote it with comments of his own. After publication the defendant expressed his approval of the article. Lord Denman CJ said (at pp.535, 536) that "If a man request another generally to write a libel, he must be answerable for any libel written in pursuance of his request: he contributes to a misdemeanour and

is therefore responsible as a principal. He takes his chance on what is to be published …".

ii) In Parkes v Prescott, (1868-69) LR 4 Ex 169 the plaintiff's conduct was discussed at a meeting of a board of guardians of which the first defendant was the chairman and at which the second defendant was also present. The first defendant said that he hoped that reporters present would "take notice of it" and the second defendant said "And so do I". The plaintiff brought proceedings for libel by way of reports of the meeting in two newspapers. The majority in the Exchequer Chamber rejected the defendants' argument that there was insufficient evidence to go to the jury that they were responsible for the publications, and Montague Smith J said this:

> "It was strongly urged for the defendants, that they could not be liable unless they authorized the libel in the very words in which it was published. If this argument is correct, then it must follow that a man could never be liable when he desired another to make and publish an outline or summary of a speech or writing, because such an outline or summary necessitates condensation, and consequent alteration of language. But the argument cannot, as it seems to me, be correct. The man who requests another to make and publish an outline or summary of a speech, writing, or proceedings, must know that the words will be to some extent those of him who makes such summary or outline; and he must therefore, be taken to constitute him an agent for the purpose, and be answerable for the result, subject always to the question whether the authority has been really followed. If this be not so, a man might become a libeller with impunity. Again, if the very words of the libel, and not its substance, are in these cases to be regarded, a man who gives the manuscript of a libel to an agent to print and publish would not be answerable, if by accident or negligence there were variations in some of the words, although not in the substance, of the libel." (at p.178)

35. I add these observations about FTI's submissions that the Website contained allegations which were "radically different from and wider than those contemplated by [the attachment to the Cardiff dairy email]", and which relate to DAAR as well as BA. Of course, the template in the Cardiff dairy email was not designed to set out specific allegations against the claimants, but purported to relate to the fictitious Welsh company. However, the context of the discussions was, as he put it, that he knew that Mr Al Refai had information "adverse to the Claimants" and there is no suggestion in Mr Hobday's evidence that the discussions in August 2011 were only about BA and not about DAAR. To my mind, it is not open to Mr Spearman to draw a distinction between the two claimants. Further, Mr Hobday gives no real detail in his evidence about the discussions on 29 August 2011, and there is an insufficient evidential foundation about them (as opposed to in the deliberately cryptic email) fully to support the submission about radical differences. In any case, this would

not, in my judgment, be something suitable for detailed exploration on applications of this kind.

36. I therefore accept Mr Warby's first submission to which I refer at paragraph 29 above, and therefore decline to determine summarily that FTI were not responsible in defamation for the publication on the Website. My conclusion is confirmed because I also accept his second submission: given the apparently covert nature of the other defendants' activities the court cannot be sufficiently confident, at least before disclosure, that it has a proper understanding of FTI's role in them to determine summarily that FTI are not responsible for the publication on the Website.

37. What of the publication of the Email? It was not, I think, really submitted by FTI that, even if I refuse the applications in relation to the Website, nevertheless I should still summarily determine in their favour an issue about their responsibility for the publication of the Email. They were right not to present this as a separate matter. I recognise that there is no evidence of FTI discussing (in August 2011 or at any time) an email of this kind to promote or publicise the Website. However, it is not, in my judgment, in the interests of justice (and would not promote the overriding objective) to deal with this issue discretely and as a matter of case management it is better determined at the trial. In any case, I consider that the claimants have a sufficient case for present purposes that the Email drawing attention to the Website was part of a common design, to which FTI were party, to publicise the allegations of wrongdoing on the part of the claimants through the Website.

38. The claim in malicious falsehood raises a separate question whether FTI had the requisite state of mind to be liable on that basis. It suffices that a defendant was activated by an improper dominant purpose (see Spring v Guardian Assurance plc, [1993] 2 All ER 273, 288); and, as Mr Warby specifically stated in his submissions, the claimants' case is not that FTI were acting dishonestly but that they acted with an improper dominant motive, an allegation that FTI have not sought to strike out in the context of the claim in conspiracy. Having rejected the application to determine summarily the issue of responsibility for publication, I decline to determine the malicious falsehood claim summarily.

39. There remains a separate complaint of FTI that parts of the claimants' pleading should be struck out or summarily determined because they no longer allege that confidential or Proprietary information is or was (as it is pleaded) "in the hands of FTI": that is to say, they no longer allege that the documents listed in Schedule D to the particulars of claim constitute confidential or Proprietary information. This point was barely mentioned during the hearing, and it should not really be contentious. It seems to me that it would be helpful if the claimants tidy up paragraphs 90 and 91 of their pleading to reflect the allegations that they now pursue, and I invite them to consider doing so. If necessary, I shall deal with this matter at the case management hearing that is planned for later this term, and I therefore adjourn this part of FTI's applications. Otherwise I refuse them.