



Neutral Citation Number: [2011] EWHC 3031 (QB)

Case No: HQ10D04366

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 25/11/2011

**Before :**

**His Honour Judge Parkes QC**

**(Sitting as a Judge of the High Court)**

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**Between :**

**ANDREA DAVISON**

**Claimant**

**- and -**

**(1) SAMEH HABEEB**

**Defendant**

**(2) PETER EYRE**

**(3) GORDON BOWDEN**

**(4) THE PALESTINE TELEGRAPH  
NEWSPAPERS LTD**

**(5) GOOGLE INC.**

**(6) GOOGLE UK LTD**

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**The Claimant acted in person**

**Antony White QC (instructed by Reynolds Porter Chamberlain LLP) for the Fifth  
Defendant**

Hearing date: 26<sup>th</sup> and 27<sup>th</sup> July 2011  
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**Approved Judgment**

### **His Honour Judge Parkes QC:**

1. The claimant acts in person. She claims in her Amended Particulars of Claim to have been an intelligence adviser to the Trade and Industry Select Committee investigating the supply of arms to Iraq, an issue which she herself investigated, and she says that she gave evidence in secret to Sir Richard Scott's inquiry into the supply of arms to Iraq and expects to give evidence to the Chilcott inquiry. She told me in the course of her submissions that she used to work in the intelligence services. When she retired, she became a Mental Health Advocate doing voluntary work with the mentally ill in North Wales, and she now runs a small business which provides services to businesses, such as mail, telephone and fax forwarding. She complains of a number of allegations published on the internet, on websites ultimately hosted by the fifth defendant, Google Inc., which provides the platform Blogger.com. These proceedings concern, in part, a blog hosted on Blogger.com by the second defendant, which carries articles written by the second defendant and contributed to by the third defendant, which the claimant alleges to be defamatory of her.
2. On 20<sup>th</sup> January 2011 the claimant obtained an order from Master McCloud giving her permission to serve the fifth defendant out of the jurisdiction, namely in the United States. Her application did not make it clear on which ground in paragraph 3.1 of CPR Practice Direction 6B she relied, but it now seems clear, and she confirms, that she was intending to rely on paragraph 3.1(9), which enables the court to allow service out of a claim in tort where damage has been sustained within the jurisdiction.

#### The present application

3. The fifth defendant, represented by Antony White QC, is a Delaware corporation with a principal place of business in California. It applies for an order setting aside the order of Master McCloud, and declaring that the court has no jurisdiction to try the claim against the fifth defendant or, alternatively, that it should not exercise any jurisdiction that it may have. The substantive grounds of the application are (1) that the claimant failed to disclose a real and substantial tort within the jurisdiction, (2) that there is no good arguable case that the fifth defendant was the publisher of any of the articles or emails complained of, and (3) that there is no good arguable case against the fifth defendant in relation to publication of any of the articles or emails complained of because the fifth defendant did not (and does not) have actual knowledge of unlawful activity or information and was not (and is not) aware of facts or circumstances from which it could have been apparent to the fifth defendant that the activity or information was unlawful, for the purposes of Article 14 of the E-Commerce Directive and Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2000.

#### The claimant's case

4. The claimant complains of a large number of articles alleged to have been published by the first, second, third, fourth and fifth defendants. She describes the first defendant as the chief editor of the Palestine Telegraph newspaper, and the owner and controller of the internet website located at the URL (Uniform Resource Locator, or internet address) <http://www.paltelegraph.com>; the second defendant is said to be a columnist on the Palestine Telegraph, who owns a blog called 'Peter Eyre's Space' and owns and operates internet websites with the URLs

<http://petereyrepatch.blogspot.com> and <http://www.eyreinternational.com>; the third defendant is said to have contributed articles to the Palestine Telegraph which were then published on 'Peter Eyre's Space', and to have contributed other material to that blog and to the Eyre International website; and the fourth defendant is the publisher of the Palestine Telegraph, an online newspaper. It appears that the first and fourth defendants settled her claim in June 2011, published an apology and retraction and agreed to pay her damages and costs. The sixth defendant, Google UK Ltd, is no longer a party, the claimant having accepted that it does not operate or control Blogger.com and has no arguable liability for the defamation complained of. The second and third defendants have said that they will defend the action and will plead justification. None of the other defendants has played any part in the present application.

5. The claimant alleges in her Amended Particulars of Claim that the fifth defendant was the publisher of 'Peter Eyre's Space' by dint (as she alleges) of publishing and/or editing and distributing or promoting the words complained of on a daily basis, of publishing 'Peter Eyre's Space', and as owning and having control over the content of <http://www.blogspot.com> and in particular <http://petereyrepatch.blogspot.com>.
6. The Particulars of Claim for which she obtained permission to serve out were later amended, a practice now sanctioned by the Supreme Court (*NML Capital Ltd v Republic of Argentina* [2011] UKSC 31, [2011] 3 WLR 273). The amendment adds articles D1-D11 and in addition alleges that the fifth defendant edited, distributed or promoted the articles complained of. The fifth defendant objects to the latter amendment because of its lack of any evidential basis, and reserves its right as far as the former is concerned to rely on the lack of advance notification of those articles for the purposes of its argument based on Reg.19 of the Electronic Commerce (EC Directive) Regulations 2002.
7. The Amended Particulars of Claim, without the attached appendix, are some 54 pages long. They are prolix and repetitive, and include much irrelevant material. Although the Claim Form refers only to defamation, the Amended Particulars of Claim appear to allege both defamation and malicious falsehood. The claimant complains of the publication of a very large number of articles. Indeed, she herself states at paragraph 37 of her pleading that they are 'so extensive and copious' that she has extracted only those words complained of 'which will assist the court'. She declares that she 'reserves the right' to include others should it at any time become necessary, and states that she will provide particulars of other articles as and when they become known to her. Understandably, she is not familiar with the rules of defamation pleading, and as a result her case is hard to follow.
8. The appendix to the Amended Particulars of Claim runs to some 318 pages. It contains nineteen articles, numbered A1-A19, email correspondence between the claimant and the defendants, a riposte which she arranged to be published on the Palestine Telegraph website, and eleven further articles numbered D1-D11, said to have been published on Blogger.com since the original Particulars were drafted. All the articles are headed with a reference to 'Pandora's Box'. The claimant sets out in the Amended Particulars of Claim fairly extensive passages from articles A2 and A8, and shorter passages from A5, A6, A11, A13, A15, A16, A19, D1, D2, D4, D5, D9 and D10. It appears that she does not claim to have been defamed by articles A1, A3, A4, A7, A9, A13, A14 or A17, and it is unclear why they are annexed. Nor is it entirely

clear from the pleading whether all the articles are said to have been published on websites ultimately hosted by the fifth defendant. However, the claimant's witness statement of 18<sup>th</sup> July 2011 (§9 and §9.1) appears to allege that they were, and I will proceed on that basis.

9. There is an analysis of articles A1-A19 in the first witness statement of Jaron Lewis, for the fifth defendant (which pre-dated the Amended Particulars of Claim), the effect of which is to point out a number of weaknesses in the claimant's pleaded case. Mr White has not based his argument on that analysis, and I do not propose to refer to it further.
10. The articles complained of take the form of a series of somewhat imprecise allegations about a number of public figures, who are variously accused of fraud and corruption and even the illicit purchase of nuclear weapons. Many of the articles, but not all, contain references to Tara Andrea Davison, which is the claimant's full name. It is not easy to make sense of the various allegations, but there seems to be a recurrent suggestion that Tara Andrea Davison is caught up in ill-specified fraudulent activities. The first references to her appeared in September 2010, on the Palestine Telegraph's website. The claimant sent a letter before action dated 16<sup>th</sup> September 2010 to the first to fourth defendants, following which further articles appeared, one of which gave her address, a matter of particular concern to her. She seems to have obtained the agreement of the first and fourth defendants to the publication of a response from her (she calls it a retraction), which was carried by the Palestine Telegraph website on or about 29<sup>th</sup> September 2010. The articles continued to appear on the second defendant's website until at least March 2011, when article D11 is said to have been published. The claimant herself described the earlier articles in her agreed Palestine Telegraph response as 'banal ramblings devoid of journalistic value'.
11. The claimant seems to have sent a letter of complaint to the sixth defendant, Google UK Ltd, on 19<sup>th</sup> September 2010. The sixth defendant explained to the claimant that it did not own or operate Blogger.com, and forwarded the letter to the fifth defendant. In the letter, she complained that she had been libelled in articles published on petereyrepatch.blogspot.com. She gave the URL of one article (that numbered A2 in the Amended Particulars of Claim), referred to articles A1, A3, A4 and A5 by their dates and titles as having also been published on the second defendant's site, and complained that the articles had libelled her by accusing her of a massive conspiracy which included theft, fraud and various criminal activities. She also complained of the publication of her address in article A5.
12. She wrote to the fifth defendant on 7<sup>th</sup> October 2010. Again she claimed to have been libelled by being linked to a criminal conspiracy which included theft and fraud. She gave the URL of article A5, and referred also to A1-A4 by title and date of publication rather than by URL. (By contrast, in her Amended Particulars of Claim, the claimant does not appear to assert that articles A1, A3 or A4 defame her.) As for the other articles now complained of, in so far as they were then published, she appears to have identified them only as 'the further linked articles naming (her) in the series prefixed by Pandora's Box' (on the second defendant's website).
13. The claimant also used the fifth defendant's own 'report abuse' system. Her evidence is that she clicked the 'defamation/ libel/slander' box, which simply produced the automated response that Google was not the publisher of content posted by means of

its services and did not remove allegedly defamatory material unless in response to a court decision. So she clicked the box 'Someone is using my private information'. By this means she complained about article A5 on 20<sup>th</sup> and 25<sup>th</sup> September 2010, stating that the 'issue type' was 'private info', and that the 'exposed info' was her address. She complained in similar terms on 30<sup>th</sup> September 2010 about an article (A8) by reference to its title, and on 2<sup>nd</sup> October 2010, again by reference to 'private info', complained of her address being given in 'many places' on the second defendant's blog.

14. As a result of the claimant's complaints, the fifth defendant contacted the second defendant, who in short alleged that the information about the claimant (her address) was not private but was in the public domain and that she was one of a group of fraudsters, that she operated scams, and that her premises had been raided by police who had taken away documents and goods which related to a 'massive fraud'.
15. There was further email communication between the claimant and the fifth defendant between 13<sup>th</sup> October and 4<sup>th</sup> November 2010, which culminated in the fifth defendant's refusal, in accordance with its stated policy, to take down the allegedly defamatory material.
16. The fifth defendant did not receive any complaint before service of proceedings which identified any of the articles numbered A6-A19, nor articles D1-D11. After service of the claim in its unamended form, it decided on a voluntary basis, pending the outcome of the claim against the second and third defendants, to take down those articles which could be located on Blogger.com by its solicitors and which appeared to identify the claimant and to contain the allegations of which she then complained (A2, A5, A8, A10-A12 and A16).

#### The fifth defendant

17. The fifth defendant's evidence shows that Google Inc provides a number of internet services, including Blogger.com, a US-based and managed service which is available worldwide. Blogger.com is a platform which allows any internet user anywhere in the world to create their own independent blog, for no charge. Blogs created using Blogger.com are estimated to contain more than half a trillion words, with about 250,000 words being added every minute. The service includes design tools to help users create layouts for their blogs, and it permits users who do not have their own URL to use URLs provided by Blogger.com, all of which contain the word 'blogspot'. That is what the second defendant did: his blogs were hosted by the fifth defendant through Blogger.com, so his URL is <http://petereyrepatch.blogspot.com>. Blogger.com is not involved with the creation of content posted on blogs. It does not create, select or approve the content, which is controlled and published by the blog owners. It merely provides the tools for users to operate their sites, whether or not hosted by the fifth defendant.
18. However, Blogger.com does operate a 'contents policy' which imposes some boundaries on the type of content that can be hosted by it. For example, it restricts material such as child pornography. It also operates a 'report abuse' feature, which enables users to report abuse on one of eight possible grounds, one of which is 'defamation/libel/slander'. Its position is that Blogger.com is operated in accordance with the laws of the USA, and that since under US law the fifth defendant is not a

publisher of Blogger.com and is not responsible for defamatory content posted on it by third parties, it will only take down material which has been found to be libellous, and therefore unlawful, by a court. The fifth defendant maintains that it is unable to adjudicate disputes as to whether words are libellous, and does not know whether the allegations against the claimant by any of the first to fourth defendants are true or warranted.

Real and substantial tort

19. The claimant obtained permission to serve out on the basis (as it now appears) of CPR 6BPD paragraph 3.1(9), namely that there was a claim in tort where the damage sustained resulted from an act committed within the jurisdiction, or the damage sustained resulted from an act committed within the jurisdiction. The question to be determined is whether such publication as the claimant has established within the jurisdiction amounts to a real and substantial tort.
20. Mr White's first point is that the claimant must establish publication of the words complained of to a substantial number of people within the jurisdiction, and he relies on *Jameel v Dow Jones & Co Inc* [2005] QB 946. That was a case where the Court of Appeal was considering whether a claim for libel should be struck out as an abuse, and applied the same test of whether there was a real and substantial tort as the court applies when considering an application to set aside permission for service out of the jurisdiction. In *Jameel*, the defendant Dow Jones had 6,000 to 10,000 subscribers, but only five could have been shown to have accessed the words complained of, two of whom did not know the claimant and had no recollection of reading his name, while the other three were all, as Lord Phillips MR put it, 'members of the claimant's camp'. The Court of Appeal struck out the claim as an abuse, observing at [55] that keeping a proper balance between the Art.10 right of freedom of expression and the protection of individual reputation required the court to bring to a stop as an abuse of process defamation proceedings that were not serving the legitimate purpose of protecting the claimant's reputation. The extent of the publication was minimal and did not amount to a real and substantial tort.
21. Mr White refers also to *Al-Amoudi v Brisard* [2007] 1 WLR 113, in which Gray J held that there was no presumption that an article placed on an internet website open to general access will have been published to a substantial number of people within the jurisdiction. (That does not mean that an inference of substantial publication may not be available on the facts, as Sedley LJ found when refusing permission to appeal in *Steinberg v Pritchard Englefield* [2005] EWCA Civ 288). Otherwise, a claimant in a libel case must generally prove that the actual words complained of – not, as Mr White stresses, just the website or blog in question - have in fact been accessed and read by a substantial number of such people. It is open to a claimant to call witnesses to say that they did read the words complained of, and, if the claimant seeks to prove wider publication, to establish a platform of facts from which the court can infer that substantial publication within the jurisdiction has taken place. Mr White insists that it is not enough to show that a website has a substantial number of subscribers (as Dow Jones did in *Jameel*), because that tells the court nothing about the number of actual readers. Indeed, the contrast in *Jameel* between the 6,000 to 10,000 subscribers to the Dow Jones website and the number who could actually be shown to have read the words complained of was very striking.

22. The claimant objects that if an inference cannot be drawn, it may be difficult to prove internet publication. She has not in fact pleaded actual publication to any reader within the jurisdiction, nor facts giving rise to an inference of substantial publication: all that she has done is to plead that the words complained of were published on the first and second defendants' websites. In effect, she has assumed a presumption of the kind ruled out by Gray J in *Al-Amoudi v Brisard*. When alerted to the problem by the lawyers for the fifth defendant, she served a second witness statement with a view to addressing the point. In that witness statement she deposes that Blogger.com has an active readership of 400 million worldwide and an estimated 44 million readers in the UK, and that the Alexa ratings service rates Blogger.com as the twelfth most popular site in the UK. That, Mr White rightly argues, is irrelevant: the focus needs to be on actual readers of the words complained of. Turning to the second defendant's blog at [petereyrepitch.blogspot.com](http://petereyrepitch.blogspot.com), she admits that she does not know its readership, but she says that it is possible to see that it has eighteen 'followers' or 'members' whose icons appear on the front page of 'Peter Eyre's Space'. She clicked on the icons, and was led to links which made it apparent that of the eighteen, four (three individuals and a website called [northeasttruth.com](http://northeasttruth.com), which appears to be involved in internet radio, which must be controlled by at least one individual) were based in England. One link did not state where the individual lived, but, she told me, she contacted him and he told her that he lived in England. So she could show that at least five people within the jurisdiction were followers of the second defendant's blog.
23. That, Mr White responds, is not good enough, because there is no evidence that any of the five 'members' had read any of the words complained of which refer to the claimant (as opposed to other material published by the second defendant), and because in any event publication to only five individuals is insufficient, on *Jameel* grounds, to establish a real and substantial tort. It is a striking feature of the case, he contends, that the claimant has not pointed to a single person within the jurisdiction who she can say has read the words complained of and thought the worse of her. She certainly does not suggest that any of the four individuals, or the proprietor of [northeasttruth.com](http://northeasttruth.com), know who she is.
24. I disagree with Mr White as far as evidence of publication is concerned. It seems to me that the fact that five individuals are interested enough in the second defendant's blog to register on it as 'members' is material from which it can at least arguably be inferred that they read the blog as a whole. The second defendant's site does not have much in common with the online edition of the Wall Street Journal (the newspaper which contained the words complained of in *Jameel*), which carries a large number of different articles, the vast majority of which would have had nothing to say about Mr Jameel. By contrast, the second defendant's website carries a number of blogs published on different dates, each consisting of several pages at least and the older ones forming an archive, but the blogs which I have seen seem to focus primarily on one elaborate conspiracy theory embracing fraud and corruption in high places, which features repeatedly on the front page of his site beneath his welcome to readers. If he writes about anything else, it is not clear from the material which I have seen. Many of his blogs refer to 'Tara Davison', or 'Tara Andrea Davison', or 'Tara Andrea Biggs-Davison', which the claimant asserts would have been understood to be references to her. It seems to me likely that the five 'members' would indeed have read at least some of the articles and words complained of. However, that does not give rise to an inference that anyone else will have done so. And there is no suggestion, as I say, that

any of the five 'members' knew the claimant, or that she knew them. There can therefore be no suggestion that any of them is in some way important to the claimant, as was the case in *Berezovsky v Michaels* [2000] 1 WLR 1004.

25. The question then arises as to whether evidence of internet publication to five individuals, none of whom knew or was known to the claimant, amounts to a real and substantial tort. For present purposes, I assume that the fifth defendant is liable for the publication.
26. The fact that none of the five individuals had any prior knowledge of the claimant does not prevent publication from giving rise to a cause of action, because there is no reason in principle why a publication should not simultaneously create and besmirch a claimant's reputation (see *Multigroup Bulgaria Holding AD v Oxford Analytica Ltd* [2001] EMLR 737, approved by the Court of Appeal in *Jameel v Dow Jones & Co Inc* at [28]). Hence publication of defamatory words to these five individuals will have caused the claimant some damage (that being presumed in libel), although it will have been very modest. I do not think that she has stated her object in proceeding against the fifth defendant, but assuming in her favour that it is to secure vindication, it is difficult to see what vindication she would obtain. If at trial she succeeded against the fifth defendant and was awarded a small amount of damages, she would in a very limited sense have achieved a form of vindication, but it would have been achieved against a defendant which (as its evidence on this application shows) has no knowledge whatever of the truth or falsity of the allegations, and would not be in a position to challenge her case by pleading justification. There would therefore be no public determination of the merits as against this defendant. That seems to me to be a factor of real importance. The fifth defendant would no doubt (even without a substantive defence) be obliged to spend substantial sums of money in defending the action, expenditure which it is not unreasonable to suppose would be irrecoverable, given that the claimant's funds, such as they are, are subject to a restraint order under the Proceeds of Crime Act 2002.
27. I must determine this issue in accordance with Convention rights, so far as I can. That requires me to keep a proper balance between the article 10 right of freedom of expression and the protection of individual reputation. If (on the assumption that the fifth defendant had submitted to the jurisdiction) this were an application to strike out the proceedings as an abuse, I would hold that the continuance of the proceedings against the fifth defendant on the basis of publication to five individuals who were not known to her, nor she to them, in circumstances in which no worthwhile vindication could possibly be obtained, would be disproportionate and an abuse of the process. It seems to me, following *Jameel*, that my approach should be no different in deciding whether the claimant has shown that there is a real and substantial tort. I conclude that she has not done so, and that for that reason the order of Master McCloud should be set aside. The claimant is not thereby denied access to justice, because she has remedies against the second and third defendants, the alleged authors of the material complained of, if she can establish the necessary elements of a claim against them. Whether or not they are persons of substance, they offer her a potential means of obtaining vindication.

Is the fifth defendant the publisher of the words complained of?

28. Mr White submits that there is no arguable case that the fifth defendant is a publisher of the words complained of at common law. It appeared towards the end of argument that the claimant did not in fact contend that the fifth defendant was a publisher before it received notification from her that Blogger.com was hosting defamatory material. This had not been apparent from her Amended Particulars of Claim or her evidence, which seemed to allege that the fifth defendant had published the offending words at all material times rather than simply after notification. If that concession was intended and properly understood by the claimant, I do not strictly need to consider the position before notification. However, in all the circumstances it is preferable, in my judgment, that I should do so.
29. If the fifth defendant is not the publisher of the words at common law, then it does not need to rely on a defence, such as the statutory defence under s1, Defamation Act 1996, or innocent dissemination (which has been effectively superseded, although not abolished, by s1 of the Act: *Metropolitan International Schools v Designtecnica Corp* [2009] EWHC 1765 QB, [2011] 1 WLR 1743 at [70]). If it is a publisher at common law, and even if it is not, there is then a question as to whether notification by the claimant denies it a defence or gives rise to liability by consent or acquiescence. Of course, at this stage the fifth defendant can only succeed if there is no arguable case against it.
30. In *Godfrey v Demon Internet Ltd* [2001] QB 201, Morland J had to consider whether Demon, an internet service provider (ISP), was liable at common law as a publisher, and whether it was able to take advantage of the defence under s1, Defamation Act 1996. It is important to understand what role Demon undertook. It hosted on its news server a particular Usenet newsgroup, storing postings for about a fortnight. A user would request a particular posting from the news server and a copy of the posting would be transmitted (presumably automatically) from the server to the user's computer. The judge held that Demon was a publisher at common law, because it was not merely the owner of an electronic system through which postings were transmitted, but chose to receive and store the newsgroup containing the offending postings on its computers, and to transmit them in response to requests. In other words, it was not simply a conduit, but it hosted and transmitted the offending material, which it could delete if it chose. When a defamatory posting was transmitted from Demon's news server to a subscriber, Demon published the posting.
31. Morland J decided that liability at common law was strict: there could still be publication even if the publisher was unaware of the defamatory material within a document. The publisher would be liable unless he could establish (the onus was on him) that he was an innocent disseminator, a principle demonstrated by *Day v Bream* (1837) 2 Mood & R 54, where the defendant, a coach-office porter, had delivered parcels containing defamatory handbills to inhabitants of Marlborough. The jury was directed that the defendant was *prima facie* liable, because what he had done amounted to publication, but that they should find for him if he had proved his ignorance of the contents.
32. Similarly, in *Emmens v Pottle* (1885-86) LR 16 QBD 354, the Court of Appeal found that the defendants, who ran a business which sold newspapers, were *prima facie* liable for a libel contained in a newspaper, but were not liable if they could prove that they did not know that it contained a libel, that their ignorance was not due to any negligence on their part, and that they did not know, and had no ground for supposing,

that the newspaper was likely to contain libellous matter. On the jury's findings, they were innocent disseminators, and therefore not liable. That principle was followed in *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170, although the result was different.

33. In the same way, Morland J decided that Demon was liable for publication of the offending words, subject to proof that they had no knowledge of the contents of the material which they hosted. That issue faced Demon with something of an uphill task, because the claimant limited his claim to the period after Demon had been notified of and therefore had knowledge of the fact that it was hosting defamatory material. In consequence, they were liable because they could not satisfy the requirements of the defence provided by s1(1) of the Defamation Act 1996, namely that they had taken reasonable care and did not know and had no reason to believe that they had caused or contributed to the publication of a defamatory statement.
34. Morland J also referred to *Byrne v Deane* [1937] 1 KB 818, a rather different case in which liability seems to have arisen by not removing – once alerted to it - defamatory material which it was in the defendants' power to remove. An anonymous member of a golf club put up on the club notice board some defamatory doggerel. The Court of Appeal found that the club's proprietors were liable for publication of the verse by allowing it to remain on the notice board. That made them consenting parties to the defamatory statement, and participants in its continued publication. The plaintiff's case seems to have been that liability arose once the defendants read the notice and failed to take it down, so the court did not have to consider whether the defendants would have been liable without knowledge of it. However, there was no suggestion that there could have been any liability before notification: it appears to have been assumed that until the club's proprietors were alerted to the notice, the only publisher was the anonymous member who posted it.
35. The decision of Eady J in *Bunt v Tilley* [2007] 1 WLR 1243 involved three ISPs (AOL UK, Tiscali UK and BT), which were sued for allowing access to the internet by others who posted defamatory messages on websites hosted by third parties by means of the service provided by the ISPs. The judge approached the issue of liability for publication at common law on the footing that they were mere conduits or facilitators, analogous to the postal service, not on the basis that they hosted any of the offending websites, because that was how this aspect of the claim was pleaded against them. He stressed the importance of that factor. That at once distinguished *Godfrey v Demon* on the facts. (However, BT was treated as a host in the context of the alternative defence under Reg.19 of the Electronic Commerce (EC Directive) Regulations 2002: see [68]). Eady J considered the relevance of the defendants' knowledge:

“[21] In determining responsibility for publication in the context of the law of defamation, it seems to me to be important to focus on what the person did, or failed to do, in the chain of communication. It is clear that the state of a defendant's knowledge can be an important factor. If a person knowingly permits another to communicate information which is defamatory, when there would be an opportunity to prevent the publication, there would seem to be no reason in principle why liability should not accrue. So too, if the true position were that the applicants had been (in the claimant's words) responsible for “corporate sponsorship and approval of their illegal activities”.

[22] I have little doubt, however, that to impose legal responsibility upon anyone under the common law for the publication of words it is essential to demonstrate a degree of awareness or at least an assumption of general responsibility, such as has long been recognised in the context of editorial responsibility. As Lord Morris commented in *McLeod v St Aubyn* [1899] AC 549, 562: “A printer and publisher intends to publish, and so intending cannot plead as a justification that he did not know the contents. The appellant in this case never intended to publish”. In that case the relevant publication consisted in handing over an unread copy of a newspaper for return the following day. It was held that there was no sufficient degree of awareness or intention to impose legal responsibility for that “publication”.

[23] Of course, to be liable for a defamatory publication it is not always necessary to be aware of the defamatory content, still less of its legal significance. Editors and publishers are often fixed with responsibility notwithstanding such lack of knowledge. On the other hand, for a person to be held responsible there must be knowing involvement in the process of publication of *the relevant words*. It is not enough that a person merely plays a passive instrumental role in the process. (See also in this context *Emmens v Pottle* (1885) 16 QBD 354, 357, per Lord Esher MR.)”

36. The most recent domestic authority on the liability of internet entities is *Metropolitan International Schools v Designtecnica Corp* [2011] 1 WLR 1743, a case concerning the Google search engine. The third defendant, Google Inc (the fifth defendant in the present case) was sued on the basis that when an internet user used the Google search engine to search for its courses, the content of the search result (or 'snippet') juxtaposed the claimant's trading name and the word 'scam', so as to suggest that the claimant's course was a scam or fraud. The process by which the snippet was formulated depended on the particular search term entered by the user and the automatic production (with no human intervention) of an index of pages relevant to the query. The claimant obtained an order permitting service out of the jurisdiction, and Google Inc applied for an order to set aside the order for service out and/or for a declaration that the court had no jurisdiction to try the claim or should decline to exercise it. The question for the court was whether the operator of a search engine could be liable for publication of the snippets. Eady J held that it could not. He considered that it was necessary to see how the concept of the search engine would be made to fit into the traditional legal framework governing publication. He held that the crucial feature of the search engine was that there was no human input from Google Inc in the search process: it did not in any meaningful sense authorise or cause the appearance of the snippet, but had merely played the part of a facilitator.
37. In both *Bunt v Tilley* and in *Metropolitan International Schools v Designtecnica Corp* at [49], Eady J concluded that for a person to be fixed at common law with responsibility for publishing defamatory words, there had to be a mental element. The need for 'knowing involvement in the process of publication of the relevant words', and the insufficiency of the defendant's role in the process if it is merely a passive instrumental one, are seized on by Mr White as the kernel of the principle by which he maintains that at common law the fifth defendant has no liability as a publisher of the material on the second defendant's website.

38. It is necessary to see how relatively novel internet-bred concepts can be made to fit into the traditional legal framework. One tool is analogy. But it can be difficult to draw effective analogies between long established modes of publication like the newspaper and the television, and radically novel platforms like the enormous burgeoning Babel which the fifth defendant hosts through Blogger.com. The analogy between the ISPs which Eady J was considering in *Bunt v Tilley* and the postal service was an apt one, because the ISPs in that case, like the postal or indeed the telephone services, were simply conduits, or facilitators, enabling messages to be carried from one person, or one computer, to another. Blogger.com, by contrast, is not simply a facilitator, or at least not in the same way as the ISPs. It might be seen as analogous to a gigantic notice board which is in the fifth defendant's control, in the sense that the fifth defendant provides the notice board for users to post their notices on, and it can take the notices down (like the club secretary in *Byrne v Deane*) if they are pointed out to it. However, pending notification it cannot possibly have the slightest familiarity with the notices posted, because the notice board contains such a vast and constantly growing volume of material. On that analogy, it ought not to be viewed as a publisher until (at the earliest) it has been notified that it is carrying defamatory material so that, by not taking it down, it can fairly be taken to have consented to and participated in publication by the primary publisher. The alternative is to say that, like Demon Internet in the *Godfrey* case, it chose to host material which turned out to be defamatory, and which it was open to anyone to download, so that at common law it was prima facie liable for publication of the material, subject to proof that it lacked the necessary mental state.
39. Eady J's observations in *Bunt v Tilley* about the need for a mental element were made in the context of ISPs which were no more than passive conduits which connected one person or one computer with another. In the present case the fifth defendant provides and hosts a platform which is designed to enable users to publish what (within limits) they wish by making their material available for others to access and download. Moreover, the fifth defendant appears to assume a degree of responsibility for what is published on its Blogger.com platform. Otherwise, its contents policy is a sham. The ability to remove offending words is plainly a highly relevant factor: as Eady J said in *Metropolitan International Schools v Designtecnica* at [55] in the context of search engines, it is not possible to draw a complete analogy between a search engine and a website host. 'One cannot merely press a button to ensure that the offending words will never reappear on a Google search snippet'. There are, as I understand it, no corresponding difficulties for the fifth defendant in operating Blogger.com.
40. The claimant argues that the fifth defendant is the publisher of the words complained of, and contends that it is actively promoting the second defendant's website, adducing as evidence of that promotion a printout of a Google search against 'Peter Eyre', which brings up 'Peter Eyre's Space' as the second snippet and a reference to his articles in the Palestine Telegraph as the fourth snippet. By contrast, she says, a 'Yahoo' search brings up the Palestine Telegraph as the seventh snippet but does not elicit 'Peter Eyre's Space' at all. The answer to that submission, of course, is to be found in the analysis in *Metropolitan International Schools v Designtecnica*: the operation of the Google search engine is entirely automatic. The claimant also makes the point that the fifth defendant has removed some of the articles complained of but not others, as supporting her contention that the fifth defendant is the publisher or editor of the material hosted on its service. I do not think that the voluntary removal

of some articles pending the outcome of the proceedings establishes that the fifth defendant is in any sense the editor of the material, but I do accept that the ability to take down offensive material is a relevant factor in determining whether it is a publisher.

41. Mr White submits that although there is no precise analogy between a service like Blogger.com and a search engine, it is clear from Eady J's reasoning in *Metropolitan International Schools* that Blogger.com is not a publisher, but simply a facilitator. It is true that there can be no intervention by Google Inc in the process of posting material on Blogger.com. But then it is unclear that there could have been any intervention by Demon Internet in the process of posting on the newsgroup which it hosted in *Godfrey*. I accept that it is unrealistic to suppose that, absent notification, Blogger.com adopts as its own any of the content which it facilitates. But this is a summary application. In my view it must be at least arguable that the fifth defendant should properly be seen as a publisher responding to requests for downloads like Demon Internet, rather than a mere facilitator, playing a passive instrumental role.
42. Whether the fifth defendant is a publisher or a mere facilitator (providing, perhaps, an almost infinitely huge electronic notice board), its potential liability depends on its mental element. Notification is plainly of cardinal importance. Eady J considered in *Metropolitan International Schools v Designtecnica* whether the legal position of the operator of a search engine was, or should be, any different once Google Inc had been informed of the defamatory content of a snippet. Although he accepted that in principle a person could, after being informed of legally objectionable material which it was possible to remove, become liable for the publication of a libel by acquiescence, he regarded it as unrealistic on the facts to attribute liability on that basis to the operators of a search engine. However, at [54] he regarded a website host as being in a different position after notification, because a website host can remove legally objectionable material. But at the same time he found at [58] that it did not follow as a matter of law that between notification and take down the operator of the search engine became or remained liable as a publisher of the offending material, because while efforts were being made to achieve a take down, it would hardly be possible to fix the operator with liability on the basis of authorisation, approval or acquiescence. While the take down process is easier for the fifth defendant as operator of Blogger.com than as operator of the Google search engine, the same principle must hold good for a website host also. But that gives the host time to respond: it does not postpone the moment of action indefinitely.
43. The fifth defendant's evidence is that it is impossible for it to adjudicate on complaints of publication of defamatory material, and that it not practicable for it to remove content without receiving the determination of a court that the material is libellous and therefore unlawful. The difficulty for the fifth defendant is to determine what is and what is not legally objectionable. Of course, if defamatory material is true or otherwise properly publishable, its continued publication may well serve a thoroughly beneficial purpose.
44. Moreover, Mr White argues that in so far as the law is developing and so far as it is necessary to do so, the court should adopt a course which is compatible with Art.10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. That is no doubt correct, although of course at the same time the court must take into account other Convention rights which may conflict with Art.10,

including, the claimant would say, her right to access to justice under Art.6 and her arguable right to reputation under Art.8, none of which takes automatic precedence over another (see for instance *Re S (a child)(identification: restrictions on publication)* [2005] 1 AC 593). Mr White relies on the arguments considered by Eady J in *Metropolitan Independent Schools* at [46], so far as they are relevant to an information services provider like Blogger, and points to the modern phenomenon of blogs as a medium for comment, including in particular political comment, and to the vast scale of that commentary as demonstrated by the huge volume of material already posted using the Blogger service. If a platform provider like the fifth defendant were to be held liable as a publisher for that mass of material, it would interfere with the free availability of the platform. Moreover, he argues, the claimant does not need to establish liability against the fifth defendant to obtain access to justice (Art.6) or effective vindication of her reputation (Art.8), because she has a good claim against the second and third defendants, both of whom are within the jurisdiction and defending the proceedings.

45. I have considerable sympathy with Mr White's submissions. It may well be unrealistic to expect the fifth defendant to take down material which is complained of as defamatory, where it is not in a position to determine for itself whether a complaint is or is not justified. If it were to respond to every complaint by requiring the offending material to be taken down, it would be making significant inroads into freedom of expression.
46. However, if (as I have found) it is arguable that the fifth defendant is a publisher at common law, following notification it would be unable (or at least arguably unable) to establish that it was ignorant of the existence of the defamatory material on Blogger.com, or to rely on the defence at s1, Defamation Act 1996, exactly as the defendant was unable to rely on that defence in *Godfrey v Demon Internet*. Even if the fifth defendant was not a publisher within the meaning of s1(1)(a) of the 1996 Act, it would also (as Morland J determined in *Godfrey* at 205g-206e) have to satisfy s1(1)(b) and (c), which require a defendant to show that he took reasonable care in relation to the publication of the statement complained of, and that he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement. It is plainly arguable that at some point between the fifth defendant's receipt of notification from the claimant in early October 2010, and the date after service when it took down those articles which appeared to identify the claimant and to contain the allegations complained of, the fifth defendant knew, or had reason to believe, that its continued hosting of that material caused or contributed to the publication of a defamatory statement, and did not take reasonable care in relation to the publication of that material
47. Even if the fifth defendant should properly be seen as a facilitator, the mere provider of a gigantic virtual noticeboard on which others published defamatory material, in my judgment it must also at least be arguable that at some point after notification the fifth defendant became liable for continued publication of the material complained of on the *Byrne v Deane* principle of consent or acquiescence.
48. For those reasons, there is in my judgment an arguable case that the fifth defendant is the publisher of the material complained of, and that at least following notification it is liable for publication of that material. I do not, therefore, set aside the order of the Master on that ground.

Is the claim defeated by Reg.19 of the Electronic Commerce Regulations 2002?

49. On 8<sup>th</sup> June 2000, Directive 2000/31/EC of the European Parliament and Council ('the Directive') was adopted. The Directive requires member states to take certain steps in order to ensure the free movement of information society services between member states.
50. Recital [17] of the Directive states that the definition of information society services covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing and storage of data, and at the individual request of a recipient of the service. By Recital [18], information society services extend to services which are not remunerated by those who receive them, and include services in hosting information provided by a recipient of the service.
51. Article 2(a) of the Directive defines information society services by reference to Art.1(2) of Directive 98/34/EC as amended by Directive 98/48/EC (the Amended Technical Standards Directive), by which 'service' is defined as:

“Any information society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. For the purposes of this definition:

  - 'at a distance' means that the service is provided without the parties being simultaneously present;
  - 'by electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;
  - 'at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request.”
52. The Directive was implemented in the United Kingdom by the Electronic Commerce (EC Directive) Regulations 2002. Regulation 2 of the 2002 Regulations defines 'information service provider' by reference to Recital [17] and Article 2(a) of the Directive, so that a 'recipient of the service' is any person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible; and 'service provider' is any person who provides an information society service.
53. Mr White submits that the fifth defendant, as the provider of Blogger.com, is the provider of an information society service, and that the second defendant is a recipient of the service, which he uses for the purpose of making information available. Subject to one question, in my judgment he is plainly right.
54. The claimant's challenge to this proposition, raised at a very late stage, is that the Blogger service is in fact not provided for remuneration. In the sense that the recipient of the service does not pay the fifth defendant to use Blogger.com, that is true, but as Recital [18] of the Directive makes clear, information society services extend to services which are not remunerated by those who receive them. The test is whether the service is normally provided for remuneration, which in the circumstances must

mean remuneration either from the recipient of the service or from a third party. Dr Matthew Collins in *The Law of Defamation and the Internet*, 2<sup>nd</sup> ed. (2005), para 17.03, takes the view that 'Commercial internet intermediaries, such as ISPs, bulletin board operators, and web hosting services will usually satisfy this definition'. To the same effect is *Gatley on Libel and Slander*, para 6.28: 'Many internet service providers charge no fee to users and derive their revenue from advertising or commission on telephone charges but the remuneration presumably does not have to be provided by the user so the vast majority will be covered, though a business organisation operating an internal network would not'.

55. The position is, according to Mr Lewis' second witness statement, that the Blogger service makes money from advertisements. If users wish to do so, they can display advertisements on their Blogger blog sites using the Google AdSense service. This allows blog owners to earn revenue. Advertisers pay the fifth defendant to display their advertisements on the blog sites, and the resulting revenue is then shared between the blogger and the fifth defendant in the ratio 68%:32%. That seems to me to be sufficient to satisfy the requirement of the Directive, as explained by recital [18], that the service must be provided for remuneration. I note that Eady J reached the same conclusion both in *Bunt v Tilley* at [41], where the service provided was that of an internet service provider, and in *Metropolitan International Schools v Designtecnica Corp* at [82]-[84], where it was a search engine, although in that case he did not regard the matter as free from doubt. I should add that the claimant argues that there are in fact no advertisements on the second defendant's website. That appears to be true as far as concerns the pages which are exhibited, but I do not think that the categorisation of the fifth defendant's service as being provided for remuneration can depend on whether an individual user chooses to profit from taking the advertisements offered.
56. If, as I conclude, the Blogger.com service provides an information society service, and the second defendant is a recipient of that service, then the fifth defendant is in principle entitled to rely on Reg.19 of the 2002 Regulations, which follows Art. 14 of the Directive and provides as follows:

“Where an information society service is provided which consists of the storage of information provided by the recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where

(a) The service provider

- (i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or
- (ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information; and

(b) The recipient of the service was not acting under the authority or control of the service provider.”

57. There is no suggestion that (b) is not satisfied. The central question, therefore, is whether the fifth defendant as the service provider had actual knowledge of unlawful activity or information, and was not aware of facts or circumstances from which it would have been apparent to it that the activity or information was unlawful.

58. Regulation 22 of the 2002 Regulations is in point:

“In determining whether a service provider has actual knowledge for the purposes of ... regulation 19(a)(i), a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, among other things, shall have regard to –

(a) whether a service provider has received a notice through a means of contact made available in accordance with regulation 6(1)(c), and

(b) the extent to which any notice includes –

- (i) the full name and address of the sender of the notice;
- (ii) details of the location of the information in question; and
- (iii) details of the unlawful nature of the activity or information in question.”

A means of contact made available in accordance with Reg 6(1)(c) is a means by which the recipient of the service can contact the service provider directly and effectively. Nothing turns on that. Mr White submits, and it is not challenged, that the 'location' in (b)(ii) must mean the URL of the information.

59. It is necessary in this context to return to *Bunt v Tilley*, where Eady J had to consider the application of Reg.19 of the 2002 regulations to BT plc, which in this context was apparently accepted to host (but not to operate) newsgroups on its servers, and which had the ability to remove postings from its server. The judge stated that in order to be able to characterise information as 'unlawful', a person 'would need to know something of the strength or weakness of available defences'.

60. Eady J's view was endorsed by Staden J in *Kaschke v Gray* [2011] 1 WLR 452. This was an application for summary judgment by a website operator (not an internet service provider), which was dismissed because there were factual issues to explore at trial. The judge had to consider actual knowledge of unlawful information, and the relevant question was whether there was a realistic prospect that the claimant could show that on notification by the claimant of her complaint, the defendant thereby acquired actual knowledge of unlawful activity or information, or awareness of facts and circumstances from which it would have been apparent to the defendant that the activity or information was unlawful. At [100], Staden J said this:

“The editors of *Gatley on Libel and Slander*, 11th ed (2008) suggest that a regulation 19 defence might be much wider than a section 1 defence, the latter referring to the defendant's means of knowledge that he is contributing to the publication of a defamatory statement, the former referring to his means of knowledge that the statement is “unlawful”. As they point out, a statement is defamatory even though there is a perfectly viable defence to a libel action. By contrast they suggest that where there was a defence to such an action it would be

difficult to say that it was “unlawful”, for example much of the law of privilege being based upon a duty to publish a defamatory statement. At a minimum they suggest that before one could say that it would be apparent to a defendant that a statement is unlawful he would need to know something of the strength or weakness of available defences. It is hard to disagree with their observation that it seems unlikely that the drafters of the Directive gave much thought to English libel law.”

61. Dr Collins, in *The Law of Defamation and the Internet*, 2<sup>nd</sup> ed., (2005), writes in similar vein at paragraph 17.25:

“Suppose, for example, that a host knows that its server contains information imputing that an individual is guilty of a serious crime, but knows no facts or circumstances bearing one way or the other on the truth or falsity of that imputation. In those circumstances, it seems likely that the host would be entitled to rely on the Regulation 19 defence. The host does not have actual knowledge that the information on its server is unlawful, and is not aware of facts or circumstances from which it is or would have been apparent that that information is unlawful.”

62. The wording in Regulation 19 of the 2002 Regulations ('... aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful') was designed to implement Art. 14's wording 'aware of facts or circumstances from which the illegal activity or information is apparent' . The Art.14 wording has very recently been considered by the European Court of Justice on a reference from the Chancery Division in *L'Oréal SA and others v eBay International AG and others* (Grand Chamber 12<sup>th</sup> July 2011), where the court was faced with the question of whether eBay would have a defence under Art.14 in a case of trademark infringement where eBay sellers used eBay to sell counterfeit goods. Mr White drew my attention to the following passage from the judgment of the Grand Chamber:

“[120] As the case in the main proceedings may result in an order to pay damages, it is for the referring court to consider whether eBay has, in relation to the offers for sale at issue and to the extent that the latter have infringed L’Oréal’s trade marks, been ‘aware of facts or circumstances from which the illegal activity or information is apparent’. In the last-mentioned respect, it is sufficient, in order for the provider of an information society service to be denied entitlement to the exemption from liability provided for in Article 14 of Directive 2000/31, for it to have been aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and acted in accordance with Article 14(1)(b) of Directive 2000/31.

[121] Moreover, if the rules set out in Article 14(1)(a) of Directive 2000/31 are not to be rendered redundant, they must be interpreted as covering every situation in which the provider concerned becomes aware, in one way or another, of such facts or circumstances.

[122] The situations thus covered include, in particular, that in which the operator of an online marketplace uncovers, as the result of an investigation undertaken on its own initiative, an illegal activity or illegal information, as well

as a situation in which the operator is notified of the existence of such an activity or such information. In the second case, although such a notification admittedly cannot automatically preclude the exemption from liability provided for in Article 14 of Directive 2000/31, given that notifications of allegedly illegal activities or information may turn out to be insufficiently precise or inadequately substantiated, the fact remains that such notification represents, as a general rule, a factor of which the national court must take account when determining, in the light of the information so transmitted to the operator, whether the latter was actually aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality.”

63. Mr White submits that the words 'insufficiently precise or inadequately substantiated' are consistent with the words of Eady J and Stadlen J, and that the service provider who is simply notified of a defamatory allegation, in circumstances where it is not clear whether a defence is available, will have received a notification which is inadequately substantiated. In those circumstances, the service provider will not have actual knowledge of unlawful information or awareness of facts or circumstances from which it would have been apparent to the service provider that the information was unlawful.
64. He very fairly referred me to the contrasting views of the editors of *Duncan & Neill on Defamation*, 2<sup>nd</sup> ed., at paragraph 20.20, where it is asserted, notwithstanding *Bunt v Tilley*, that 'unlawful' in Reg.19 means '*prima facie* unlawful', i.e. the same as 'defamatory'. That view is undermined by the decisions in *Kaschke v Gray* and *L'Oréal v eBay*, and appears to give little weight to its Art.10 implications.
65. The claimant's submissions were mainly directed to the question of actual knowledge. She submitted that her letters to the fifth defendant (the first of them having been forwarded by the sixth defendant) provided the fifth defendant with actual knowledge of unlawful information. She argued that the very outlandishness of the allegations must have made the fifth defendant realise that they must be false. The same submission was made to Stadlen J in *Kaschke v Gray*, where the claimant argued that the illegality of the information would have been apparent to the defendant because the Labour Party would not have been prepared to consider as a candidate someone who (as the words complained of alleged in that case) was or had been a member of the Baader-Meinhof terrorist group. The judge observed at [102] that 'Leaving aside the fact that if this was true it would be by definition equally apparent to all persons to whom the article was published as much as to (the defendant), it does not seem to me that this would be sufficient to support a realistic prospect of a finding that (the defendant) was aware of facts from which it would have been apparent that the allegedly defamatory words were unlawful'. It is to be noted that, as I mention above, although the allegations complained of are in some respects outlandish, as far as the claimant is concerned they appear to focus on allegations of involvement in fraud, and it is admitted that the claimant is subject to a POCA 2002 restraint order. The fifth defendant was faced not only with the claimant's complaints but also with the second defendant's attempt to substantiate his allegation that the claimant was involved in fraud, in which he specifically referred to the police having raided the claimant's premises and taken many files which allegedly related to a 'massive fraud'. Mr White submits that the fifth defendant cannot sensibly be said, by dint of the claimant's notification, to have had actual knowledge of unlawful information or awareness of

facts and circumstances from which it would have been apparent to the fifth defendant that the information was unlawful.

66. The claimant also argues that she is entitled to the presumption of innocence. That of course is true as far as her criminal proceedings are concerned, but it does not assist the fifth defendant to determine whether the second defendant's allegations are unlawful. The fifth defendant did not rely on the police raid on her premises to conclude that she was guilty of fraud: its position is that it has no possible means one way or the other to form a view as to where the truth lies.
67. The claimant also advances alternative forms of unlawfulness of which the fifth defendant should have been aware. She makes the point that she had been arrested, so that criminal proceedings were active and there was potential for serious prejudice to the proceedings under s2, Contempt of Court Act 1981. Mr White responds, in my judgment correctly, that there is no cause of action in contempt of court, even with the leave of the Attorney-General under s7, and no appropriate gateway for permission to serve out of the jurisdiction, that the claimant has not even pleaded a claim in contempt of court, and that in any event any unlawful information would have to be referable to the defamation claim. I think that must be right: Reg 19 must contemplate, it seems to me, that the claim in damages relates to the information which is known to be unlawful. Moreover, Mr White points out that the claimant did not notify the fifth defendant of any potential contempt of court. In any event, it seems to me, the fifth defendant would hardly be in a better position to ascertain whether the second defendant's postings might be held to create a substantial risk that the course of justice in the criminal proceedings against the claimant would be seriously impeded or prejudiced, in accordance with s2(2) of the Contempt of Court Act 1981, than it would to determine whether the defamatory material of which she complained was in fact libellous. Similarly, the claimant submits that her claim that her address had been disclosed, which was notified to the fifth defendant, amounted to a claim for misuse of private information and breached her Art.8 rights, to which Mr White responds as he did in respect of the alleged contempt of court. He also seeks to rely on the claimant's acceptance in argument that publication of her address alone would be inconsequential unless it was accompanied by the publication of defamatory material. I am not clear what exactly she meant, and would not rest my decision on that. However, her claim that the publication of her address was a misuse of private information was not in any event one on which the fifth defendant could adjudicate, given the second defendant's insistence that her address was in the public domain.
68. My conclusion is that there is no realistic prospect of the claimant establishing that the notification of her complaint fixed the fifth defendant with actual knowledge of unlawful activity or information, or made it aware of facts or circumstances from which it would have been apparent to it that the activity or information was unlawful. The fifth defendant was faced with conflicting claims from the claimant and the second defendant between which it was in no position to adjudicate. That is of course not to say that a different conclusion could not be reached on different facts, such as where (to adapt the words of the ECJ) a complaint was sufficiently precise and well substantiated, and where there was no attempt by the author of the defamatory material to defend what had been written. But on the present facts, which are not in any material respect in dispute, in my judgment there is no good arguable case, having regard to Reg.19 of the 2002 Regulations, that the fifth defendant is liable in damages

or for any other pecuniary remedy in respect of the publication of the words complained of on Blogger.com, whether before or after notification by the claimant of her complaint.

69. That of course leaves open the question of an injunction, on which I have not heard argument. It seems to me improbable, for reasons which it is hardly necessary to state, that an injunction granted by this court against a US corporation in a defamation matter involving First Amendment rights would be enforceable against the fifth defendant. Moreover, given that the claimant (if she makes good her case) has remedies in this jurisdiction against the second and third defendants, including injunction, there is plainly an argument that it would be disproportionate to join the fifth defendant for that reason only, especially since the fifth defendant has taken down the only articles which the claimant identified before the issue of proceedings as being defamatory of her. However, those are no more than provisional views, and I will hear argument on the point if requested to do so.
70. In the result, I set aside the order of Master McCloud dated 20<sup>th</sup> January 2011 granting the claimant permission to serve the Claim Form on the Fifth Defendant outside the jurisdiction.