



Neutral Citation Number: [2009] EWHC 1765 (QB)

Case No: HQ09X01852

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 July 2009

Before :

THE HONOURABLE MR JUSTICE EADY

Between :

**METROPOLITAN INTERNATIONAL SCHOOLS
LIMITED (T/A SKILLSTRAIN and/or
TRAIN2GAME)**

Claimant

- and -

**(1) DESIGNTECHNICA CORPORATION
(T/A DIGITAL TRENDS)
(2) GOOGLE UK LIMITED
(3) GOOGLE INC**

Defendants

Desmond Browne QC and David Hirst (instructed by Eversheds LLP) for the Claimant
Antony White QC and Catrin Evans (instructed by Reynolds Porter Chamberlain LLP) for
the Third Defendant

Hearing dates: 24-25 June 2009

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE EADY

Mr Justice Eady :

The parties

1. The Claimant in these proceedings is Metropolitan International Schools Ltd, which now trades as “SkillsTrain” and/or “Train2Game”. Over the period from 1992 to 2004 the Claimant apparently traded under the name Scheidegger MIS. It is described as one of the largest European providers of adult distance learning courses and claims to have over 50 years experience in teaching vocational skills. It is only recently, with effect from 16 March 2009, that it has carried on business under the style “Train2Game” providing distance learning courses in the development of computer games and their design. The name “SkillsTrain” has been used since February 2004 in connection with the Claimant’s distance learning courses in Information Technology and book-keeping. The way the system works is that students who enrol on its courses work independently on materials provided by the Claimant and periodically submit assignments for assessment via the Internet. Its tutors may be contacted either by telephone or email.
2. It has brought proceedings against various parties in respect of allegations published on the Internet.
3. The First Defendant is Designtecnica Corporation, which trades as “Digital Trends”. It is incorporated under the laws of Oregon in the United States and maintains a website with the URL www.digitaltrends.com. This is said to provide “news, professional reviews, and opportunities for public discussion of the latest consumer electronics products, services and trends”. The evidence suggests that the website receives some two million unique visitors per month and that requests are made for more than ten million page views per month.
4. The First Defendant’s website contains some 14 separate bulletin boards or forums with the URL <http://forums.digitaltrends.com/>. It is alleged that these forums have 14,000 members and that they comprise 13,000 separate threads or discussions, in which almost 75,000 individual postings have been made up to the commencement of these proceedings.
5. Internet users who wish to post a comment within a specified thread, or to commence a new thread, are required to register a username with the website. This will then be published alongside any posted contribution together with the date and time on which it was made. Anyone may access the forums and read their contents. So too, the contents are accessible to Internet search engines.
6. The Second Defendant, Google UK Ltd, is a subsidiary of the well known US corporation, Google Inc (being incorporated under the laws of Delaware and based in California). Google Inc has been joined as the Third Defendant. Its services can be accessed via the Internet from most countries in the world. It has approximately 20,000 employees and, I understand, made profits in the first quarter of 2009 of £952m. Those services include Internet search, cartography, news aggregation and the hosting of blogs and emails. Its revenue is derived from advertising.

7. The scale of the operation emerges from the evidence of Mr Jaron Lewis, who is the solicitor for the Second and Third Defendants. There were in January 2005 approximately 11.5 billion publicly indexable web pages; that is to say, pages which a search engine such as that made available by Google would be able to access. Since then, the number of such pages has increased to approximately 39 billion. This figure is derived from worldwidewebsize.com. As at 31 March of this year, there were approximately 1.59 billion users accessing the Internet. This is based on the most recently available statistics published by InternetWorldStats.com.
8. The Second Defendant does not operate the Google search engines, as was explained to the Claimant's solicitor before the commencement of these proceedings. According to its defence, served on 9 June 2009, it carries on a sales and marketing business but does not provide online services (as the Claimant alleges). It employs some 600 people, including technical staff, who provide information technology support services to the frontline marketing staff or are software engineers or product managers. It is averred that it does not operate or control any Google branded search engine: moreover, its employees do not have access to any of the technology used to operate and control google.com and google.co.uk, which are owned and operated by the Third Defendant. Despite this, it is alleged in the particulars of claim that the Second Defendant is responsible for the publication of information gathered in response to Google searches. Accordingly it is pleaded on behalf of the Second Defendant that "... the Claimant has sued the wrong person and should discontinue its claim or have judgment entered against it".

The role of search engines

9. Because it is so central to the issues now before the court, it is necessary for me to summarise the evidence explaining how search engines work. This again derives primarily from Mr Jaron Lewis, although it is a subject also covered in expert evidence introduced by the Claimant from Dr David Sharp.
10. The Internet comprises web pages containing information and each page has a unique address (the "URL"). The page will appear when the URL is typed into an Internet browser. Each website address ends with a "top level domain", which is a series of letters often denoting the country in which the website is registered. Thus, many websites which are accessed in the United Kingdom will end with the ".uk" domain. Google operates search engines for all the major "country code top level domains" ("ccTLDs"). The principal reason why this is done is to enable Google searches to provide appropriate results for local users. It was explained, by way of example, that a search on the word "bank" would yield different results on www.google.co.uk from those appearing on www.google.ca (where primarily Canadian banks would appear).
11. It would be impossible for Google to search every page available on the web in real time and then deliver a result in a time frame acceptable to users. What happens is that Google compiles an index of pages from the web and it is this index which is examined during the search process. Although it is well known, it is necessary to emphasise that the index is compiled and updated purely automatically (i.e. with no human input). The process is generally referred to as "crawling" or the "web crawl".

12. When a search is carried out, it will yield a list of pages which are determined (automatically) as being relevant to the query. The technology ranks the pages in order of “perceived” relevance – again without human intervention. The search results that are displayed in response to any given query must depend on the successful delivery of crawling, indexing and ranking. Content on the Internet is constantly being crawled and re-crawled and the index updated.
13. Obviously Google has no control over the search terms entered by users of the search engine or of the material which is placed on the web by its users.
14. The complaint in these proceedings against the First Defendant relates to information appearing on one of its web bulletin boards posted by third parties. Needless to say, the Second and Third Defendants have no control over the First Defendant or over what appears on its bulletin boards.

The nature of the claims

15. The Claimant complains of two distinct matters so far as the First Defendant is concerned. At paragraphs 13–16 of the particulars of claim, it pleads a forum thread commenced on 25 March 2009 by a user with the username richardW under the title “Train2Game new SCAM for Scheidegger” (“the Train2Game thread”). It was said to be comprised of 146 separate postings, published between 25 March and the date of the pleading (1 May 2009), running to 15 separate web pages. A copy of the thread was served as Annex 2. It is unnecessary to rehearse it for the purposes of this judgment, but at paragraph 16 of the particulars of claim six natural and ordinary meanings are spelt out, namely that there are reasonable grounds to suspect:
 - i) that the Claimant’s sales representatives for Train2Game sign up students in a cavalier manner irrespective of their suitability for the course such that the Claimant may be liable for a legal claim for misrepresentation;
 - ii) that the Claimant’s sales representatives employed a bogus and fraudulent credit checking and loan financing assessment that does not comply with UK consumer credit law;
 - iii) that the Claimant knowingly takes money from students’ bank accounts without authorisation;
 - iv) that the Claimant’s sales claims for Train2Game courses are unfeasibly overblown, and that the course, in fact, offers appalling value for money and is of such low quality that the Claimant should be investigated by UK Trading Standards;
 - v) that the Claimant has knowingly infringed the copyright of third parties in the preparation of Train2Game course materials;
 - vi) that the Claimant’s Train2Game course is nothing more than a scam or fraud intended to deceive honest people out of substantial sums of money.

16. Secondly, the Claimant complains against the First Defendant of the forum thread commenced on 1 September 2006 by a user with the username Becca2006 under the title “Scheidegger/SkillsTrain” (“the SkillsTrain thread”). This is particularised in paragraphs 20–24 of the particulars of claim. It is said to comprise 1,364 separate postings, all published between 1 September 2006 and 1 May 2009, running to 137 separate web pages. Excerpts are attached to the pleading as Annex 4. At paragraph 23, the following natural and ordinary meanings are identified, namely that there are reasonable grounds to suspect:
- i) that the Claimant’s sales representatives for SkillsTrain sign up students in a cavalier manner irrespective of the suitability or affordability of courses such that the Claimant would may be liable for misrepresentation;
 - ii) that the Claimant’s sales claims for SkillsTrain courses are unfeasibly overblown, and the course offers appalling value for money and low standards such that the Claimant should be prosecuted by UK Trading Standards;
 - iii) that the Claimant’s SkillsTrain courses are nothing more than a scam or fraud intended to deceive honest people out of substantial sums of money.
17. It will immediately be apparent how diffuse and subjective these meanings are and, correspondingly, how difficult it would be to frame an injunction with sufficient clarity and precision to be readily enforceable.
18. So far, the allegations have concerned the First Defendant alone. As to the Second and Third Defendants, the claim is confined to a search result identified at paragraph 17 of the particulars of claim:

“Since 25 March 2009 or around 25 March 2009, on each occasion that an Internet search is performed on ‘Train2Game’ the Second and/or Third Defendant published or caused to be published at www.google.co.uk and/or www.google.com a search return for the Train2Game thread which for 3 weeks preceding the date of these particulars set out the following words defamatory of the Claimant as the third and fourth highest search result:

“Train2Game new SCAM for Scheidegger’ ... ”

19. The natural and ordinary meaning pleaded is that the Claimant’s Train2Game course was a scam or fraud intended to deceive, and a further example of the Claimant’s fraudulent conduct.

The need to serve out of the jurisdiction

20. Since the First and Third Defendants are outside the jurisdiction, permission was sought to serve out and on 1 May of this year Master Yoxall granted permission to serve them both and to effect service by email or fax. This was on the basis that the requirements of CPR 6.36 and 6.37 had been met. They were in due course served on 5 May and, a week later, the Second Defendant was also served. I shall need to

return, in due course, to criticisms made on the Third Defendant's part both as to the evidence placed before the Master in support of the application to serve out and also of the terms of the pleading originally served.

21. The only application now before the court is that of the Third Defendant, dated 5 June 2009, to set aside the Master's order and/or seeking a declaration pursuant to CPR Part 11 that the court has no jurisdiction to try the claim or that, if it has, the court should decline to exercise it.
22. It is submitted by Mr White QC, appearing on the Third Defendant's behalf, that the application raises novel and important questions of law as to the court's jurisdiction in relation to Internet location tool services (generally referred to as "search engines") and, in particular, where the operator of the service is located and/or the search engine is operated outside the jurisdiction. Mr White summarised the grounds relied upon as follows.

The Third Defendant's grounds for setting aside

23. First, it is said that the Claimant cannot comply with the "overriding principle" and demonstrate that England and Wales is the proper place in which to bring the claim for the purposes of CPR 6.37(3): see e.g. *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269 at [41]. It is submitted, notwithstanding the domicile of the Claimant within this jurisdiction, that California would be the more appropriate forum because (a) the Third Defendant is an American company operating in that state and (b) there would be no enforceable remedies available against the Third Defendant in this jurisdiction.
24. Second, even if England is the proper forum, it is argued that the Third Defendant has no responsibility for the publication of the words complained of and there is, accordingly, no reasonable prospect of success, as required by CPR 6.37(1)(b). To put it another way, there would not be "a good arguable case": see *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] EWHC 3418, at [26] (Toulson J). Reliance is placed on the common law and/or s.1 of the Defamation Act 1996 and/or Regulations 17, 18 or 19 of the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002 No 2013). This is a distinct ground which does not depend on jurisdiction or the geographical location of the Third Defendant.
25. Thirdly, it is said by Mr White to be important that, in its interpretation of the law, the court must avoid a situation in which there would be a disproportionate impact on freedom of expression (both with regard to the Third Defendant and more generally). Mr White developed this argument by drawing attention to the potentially serious consequences if, at trial, the court were to grant an injunction or award damages against the Third Defendant (which were, for the sake of argument, enforceable remedies):
 - i) It would create a divergence of approach between this jurisdiction and some other EU member states in relation to the liability of search engines (with undesirable consequences for trade within its borders).

- ii) It would create a similar divergence of approach between this jurisdiction and the United States.
 - iii) It would have the potential to prevent access to Google search results (generated by searches carried out using various combinations of “offending” words) not only by users in this jurisdiction but also elsewhere (including jurisdictions where the relevant “snippet” would not be regarded as unlawful under local law). This is said to have implications for comity.
 - iv) It would create a chilling effect in that the Third Defendant (and perhaps other search engine operators) would adopt a more cautious approach to Internet searching to avoid the threat of future libel claims in this jurisdiction.
26. Fourthly, Mr White relies upon an alleged abuse of process. This is put in two ways, namely (a) that there was no “real and substantial tort” within the jurisdiction for which the Third Defendant was responsible (the Claimant’s real complaint being against the words posted on the First Defendant’s web forums), and (b) if vindication is appropriate, it could and should most appropriately be pursued in relation to the First Defendant only. (I would simply say, as to the first point, that I would not be in a position at this stage to rule that the offending words have not been accessed or read by a significant number of people. That could only be determined later.)
27. Fifthly, Mr White argues that the Claimant does not bring itself within CPR Practice Direction 6B3.1(2). This provides that a claimant may serve a claim form out of the jurisdiction, with permission, where a claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction. It is said, in particular, for a variety of reasons, that there is no reasonable prospect of the Claimant obtaining an injunction against the Third Defendant. Reliance is place in this context on all the points identified above and, additionally, on the factors that (a) any injunction would not be enforceable in the United States, in any event, and (b) it would be impractical to design an order that would actually achieve the Claimant’s objective in any way that was proportionate.
28. Sixthly, the point is made that the Claimant would also fall outside CPR Practice Direction 6B.1(3), since it cannot be suggested either that there is between the Claimant and the Secon Defendant a real issue which it is reasonable for the court to try or that the Third Defendant is a necessary and proper party to the claim against the Second Defendant. It has already been explained why the Second Defendant is said not to have any responsibility in law for the “snippet” complained of. It is true that the Claimant is sceptical about the Second Defendant’s denial, but there is no evidence so far before the court to support the proposition that it was, nevertheless, responsible. The Claimant has made clear that it is simply hoping that some such evidence will emerge after “proper detailed disclosure on the issue”, but I do not accept that this speculative approach is appropriate for this purpose.
29. Finally, as I indicated earlier, complaint is made of the way in which the order for permission to serve out was obtained. It is submitted that the evidence adduced before the Master misrepresented the nature of the claim against the Third Defendant and failed to draw attention to the problems in establishing liability. This is an

independent ground on which the Third Defendant invites the court to set the Master's order aside.

30. No one suggests that there was anything dishonest about the alleged misrepresentation to the Master. It was made no doubt inadvertently and is explicable by a failure to check carefully what went before him. Moreover, the Master does not appear to have thought that he had been materially misled. That, however, in itself would not seem, paradoxically, to be of great significance. The test is an objective one. That is illustrated by the decision of Burton J in *Network Telecom (Europe) Ltd v Telephone Systems International Inc* [2003] EWHC 2890 (QB). I shall return to these criticisms in due course.

The legal framework

31. The legal submissions in this case were made against the background of well established principles in relation to the court's jurisdiction in respect of tortious publications, including via the Internet. It has long been established that publication takes place, for the purposes of a defamation claim, where the relevant words are heard or read: see e.g. *King v Lewis* [2005] EMLR 45, CA. As to publication on the Internet, it has been held that:

“If a publisher publishes in a multiplicity of jurisdictions it should understand, and must accept, that it runs the risk of liability in those jurisdictions in which the publication is not lawful and inflicts damage.”

(See *Gutnick v Dow Jones* [2002] HCA 56 at [192], quoted and followed in *King v Lewis*, cited above.)

32. Each case must be determined in the light of its own circumstances, but there is a principle that the jurisdiction in which the tort was committed is to be regarded as *prima facie* the natural forum for the dispute: see e.g. *Berezovsky v Michaels* [2000] 1 WLR 1004, at 1012, *per* Lord Steyn.
33. It is recognised that in the context of allegations of Internet publication there is no presumption that the words were actually read, the burden being on the claimant in this respect: see e.g. *Al Amoudi v Brisard* [2006] EWHC 1062 (QB). In the present context it is not to be assumed, of course, because some prospective applicants for the Claimant's course have seen the criticisms on the First Defendant's forum (as appears to be the case), that such persons have also seen the “snippet” which founds the claim against the Third Defendant.
34. This is certainly not a case of “libel tourism”, in the sense that the Claimant operates in this jurisdiction and the damage to its reputation of which complaint is made would appear also to be similarly confined.

Can the operator of a search engine be liable for publication?

35. I must now turn to the first of Mr White's submissions, which is founded upon the particular characteristics of a search engine. There appears to be no previous English

authority dealing with this modern phenomenon. Indeed, it is surprising how little authority there is within this jurisdiction applying the common law of publication or its modern statutory refinements to Internet communications. The only two decisions that would appear to be relevant to the role of Internet intermediaries are at first instance: *Godfrey v Demon Internet Ltd* [2001] QB 201 and *Bunt v Tilley* [2007] 1 WLR 1243. Both counsel made extensive reference to these cases.

36. Mr White's primary submission was that the Third Defendant is simply not to be regarded as a publisher of the words complained of. To be clear, he does not merely submit that the Third Defendant is not responsible for anything appearing on the First Defendant's website, but he also argues that it is not responsible as a matter of law for the content of the "snippet" complained of, as produced by its own search engine. He submits that the test for publication, in this context, is whether the relevant Internet intermediary was *knowingly* involved in the publication of the relevant words: see e.g. *Bunt v Tilley*, cited above at [22]-[23]. In that case, I held as a matter of law that an Internet intermediary, if undertaking no more than the role of a passive medium of communication, cannot be characterised as a publisher at common law and would not, therefore, need to turn to any defence: see at [36]-[37].
37. In the light of the automatic nature of the search engine's activities, Mr White submits that the Third Defendant can have no liability with regard to any publication of the relevant "snippet" – at least prior to notification from the Claimant as to the identity of the specific URLs from which the words complained of originated. Such notice would enable the Third Defendant to take steps to block access to, at any rate, some degree. In fact, Mr White goes further and submits that the Third Defendant would not be liable as a matter of law even after notice. For this purpose he would, if necessary, seek assistance from the common law defence of innocent dissemination (considered below).
38. It is true that the circumstances and characteristics of a search engine are in certain respects different from those of the defendants who have so far been considered in English court decisions. The immediate question is whether those distinctions are material when it comes to establishing legal liability.
39. In *Godfrey v Demon Internet*, the defendant stored information posted by other people, transmitted it to subscribers, and had knowledge that the words complained of were defamatory. It also had the ability to take them down from the Web. In those circumstances, Morland J took the view that it could properly be regarded as a publisher at common law. It is not suggested in the present case that the Third Defendant either stores or hosts the relevant information in the same sense as *Demon Internet*. The claim is based upon the automatically generated search result.
40. Mr White submits that the present circumstances are more closely analogous to those considered in *Bunt v Tilley*. That case concerned the transmission and caching of information, but there was no evidence of actual knowledge. An analogy was drawn by Mr White with the role of telephone carriers, as it was also in *Bunt v Tilley*, who are considered to be "facilitators" of telephone calls rather than being responsible for their publication. I was referred to paragraphs 15.38 and 15.43 in Dr Matthew Collins' work *The Law of Defamation and the Internet* (2nd ed, 2005):

“15.38 There is ... a line of authority arising out of intellectual property cases in the United Kingdom to the effect that persons who *procure* the commission of torts are liable jointly and severally with the principal tortfeasor, while persons who merely *facilitate* the commission of such torts are not exposed to liability. It is possible that this line of authority might apply to defamation law. If so, telephone carriers might be mere facilitators of defamatory telephone calls, and so not capable of being held liable as publishers.

...

15.43 ... There is ... an argument that telephone carriers are mere ‘facilitators’ of telephone calls and therefore cannot be responsible for the publication of defamatory telephone calls. If that view is correct, and there is a distinction between ‘publishers’ and ‘mere facilitators’, then there is a strong argument that mere conduit Internet intermediaries are mere facilitators of Internet applications passing through their computer system, and therefore not responsible for publishing them.”

41. The same passages were cited in *Bunt v Tilley* and I referred there, at [10], to the relevant line of intellectual property cases and pointed out the observation of Chadwick LJ in *MCA Records Inc v Charly Records Ltd* [2002] EMLR 1, at p28, to the effect that this line of authority applied “at least” in the field of intellectual property.
42. The appropriate question here, perhaps, is whether the Third Defendant should be regarded as a mere facilitator in respect of the publication of the “snippet” and whether, in particular, that would remain a proper interpretation even after the date of notification. Mr White submits that the common law relating to publication by Internet intermediaries is currently unclear and uncertain. That being so, the court should develop the law, in so far as it is necessary to do so, in a manner which is compatible with Article 10 of the European Convention on Human Rights and Fundamental Freedoms. That is true, although I also need to take note of the principle now recognised in English law (and, for that matter, in Strasbourg jurisprudence) that no one Convention right is to be regarded as taking automatic precedence over any other: see e.g. *Re S (A Child)* [2005] 1 AC 593.
43. By way of illustration, Mr White invited my attention to the decision of the Court of Appeal and that of the House of Lords in *Derbyshire County Council v Times Newspapers Ltd* [1992] 1 QB 770 and [1993] AC 534. Although the House of Lords found it unnecessary to have resort to the European Convention in reaching its conclusion, there is no doubt that the Court of Appeal addressed Article 10 in determining whether or not it was appropriate (i.e. necessary and proportionate) to accord a local authority the right to sue in defamation for the protection of its own

reputation (by contrast with the recognised rights of individual councillors or officers to sue in a personal capacity). I am invited here, by way of analogy, to come to the conclusion that it is neither necessary nor proportionate to impose potential liability for defamation on the owners or operators of a search engine in respect of material thrown up automatically on any of their “snippet” search results. It is to be borne in mind that in cases where there is a genuine need for compensation or vindication the relevant complainant would (at least in theory) have a remedy, somewhere, against the person(s) who put the original article on the Web, to which the search engine has merely drawn attention.

44. It is right, as Mr White points out, that the purpose of Article 10 is to protect not merely the right of free expression but also, correspondingly, the right on the part of others to receive information sought to be communicated.
45. By way of further illustration, Mr White referred to the decision of the Court of Appeal in *Loutchansky v Times Newspapers Ltd (Nos 2-5)* [2002] QB 783 at [74], which was subsequently upheld in Strasbourg in its recent judgment of 10 March 2009: *Times Newspapers Ltd (Nos 1 & 2) v UK (Applications 3002/03 and 23676/03)*.
46. In developing his theme, Mr White highlighted six particular considerations:
 - i) One of the factors which the court is required to take into account under s.12 of the Human Rights Act 1998 is the extent to which the relevant material has become available to the public. In this particular case the information had been made available to the public, in the first place, not by the Third Defendant but by the First.
 - ii) The effect of imposing liability on the operator of a search engine for signposting websites would be to make it more difficult for the public to identify and access information on such websites. It is obvious that some of them will contain important and valuable information in the public interest: it is equally obvious that some publish scandalous material and, as Lord Hobhouse pointed out in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, at [238], no public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society being informed – not misinformed. In the present case, it is submitted to be significant that the origin of the words complained of on the First Defendant’s forum would appear to be disgruntled customers of the Claimant, who were using the Internet to voice their dissatisfaction and to warn other consumers. This is said to be of special importance, given that Article 10 includes the right to receive information.
 - iii) The Third Defendant is not, and could not be, in a position to check the truth or accuracy of the vast amount of information crawled over by its automated search engine. It is said to be inconsistent with the nature of a gateway to the Internet, such as this Defendant, that it should be held liable for what is found on the other side.

- iv) The Claimant does not need to hold the Third Defendant liable in order to obtain access to justice (Article 6) or to obtain an effective remedy to vindicate its reputation (Article 8). I made a similar point in *Bunt v Tilley* at [79]:

“The claimant is not deprived of access to justice. His remedies lie against the first to third defendants (if he can establish the necessary ingredients in respect of each). They may not be persons of substance, such as to make it worthwhile pursuing them. Even if that is right, it is clearly not a sufficient reason for bringing in the present applicants ... ”

There is a sustainable claim against the First Defendant and, as a matter of fact, the Claimant has recently entered judgment in default. It may well not be enforceable in the United States, but that does not render it any more appropriate to bring in the Third Defendant.

- v) It would be inconsistent, it is said, with the public policy underlying Regulation 17 of the 2002 Regulations for a search engine to be liable for placing signposts at the end of conduits, thereby assisting the public to choose which routes to take, when the operator of a conduit would be exempt from liability. As Mr White put it, “If it is in the public interest for such conduits to be freely accessible it must be in the public interest for information to be made available to assist the public in deciding which conduits to access.”
- vi) Mr White adds that it would render English law incompatible with the laws of certain other member states of the EU for there to be liability in relation to search engines. In certain of those states liability for search engines has been excluded, either by judicial or statutory means. That, at least, suggests that it would be hard to justify interference with Article 10 rights in this jurisdiction as being “necessary and proportionate”.

47. Against this background, it is submitted that I should not apply the common law in such a way as to impose liability on the Third Defendant in respect of the automated activities of its search engine.

My conclusions on publication

48. I turn to what seems to me to be the central point in the present application; namely, whether the Third Defendant is to be regarded as a publisher of the words complained of at all. The matter is so far undecided in any judicial authority and the statutory wording of the 1996 Act does nothing to assist. It is necessary to see how the relatively recent concept of a search engine can be made to fit into the traditional legal framework (unless and until specific legislation is introduced in this jurisdiction).
49. It has been recognised, at common law, that for a person to be fixed with responsibility for publishing defamatory words, there needs to be present a mental element. I summarised the position in *Bunt v Tilley* at [21]-[23]:

“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.)"

The passage to which I referred in *Emmens v Pottle* concerned defendants who were said by the Master of the Rolls to have been *prima facie* liable, on the basis that they had handed to other people the newspaper in which there was a libel on the plaintiff. His Lordship continued:

"I am inclined to think that this called upon the defendants to shew some circumstances which absolved them from liability, not by way of privilege, but facts which shew that they did not

publish the libel. We must consider what the position of the defendants was. The proprietor of a newspaper, who publishes the paper by his servants, is the publisher of it, and he is liable for the acts of his servants. The printer of the paper prints it by his servants, and therefore he is liable for a libel contained in it. But the defendants did not compose the libel on the plaintiff, they did not write it or print it; they only disseminated that which contained the libel. The question is whether, as such disseminators, they published the libel? If they had known what was in the papers, whether they were paid for circulating it or not, they would have published the libel, and would have been liable for so doing. That, I think, cannot be doubted. But here, upon the findings of the jury, we must take it that the defendants did not know that the paper contained a libel. I am not prepared to say that it would be sufficient for them to shew that they did not know of the particular libel. But the findings of the jury make it clear that the defendants did not publish the libel. Taking the view of the jury to be right, that the defendants did not know that the paper was likely to contain a libel, and, still more, that they ought not to have known this, which must mean, that they ought not to have known it, having used reasonable care – the case is reduced to this, that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel. That being so, I think the defendants are not liable for the libel. If they were liable, the result would be that every common carrier who carries a newspaper which contains a libel would be liable for it, even if the paper were one of which every man in England would say that it was not likely to contain a libel. To my mind the mere statement of such a result shews that the proposition from which it flows is unreasonable and unjust. The question does not depend on any statute, but on the common law, and, in my opinion, any proposition the result of which would be to shew that the Common Law of England is wholly unreasonable and unjust, cannot be part of the Common Law of England.”

50. When a search is carried out by a web user via the Google search engine it is clear, from what I have said already about its function, that there is no human input from the Third Defendant. None of its officers or employees takes any part in the search. It is performed automatically in accordance with computer programmes.
51. When a snippet is thrown up on the user’s screen in response to his search, it points him in the direction of an entry somewhere on the Web that corresponds, to a greater or lesser extent, to the search terms he has typed in. It is for him to access or not, as he chooses. It is fundamentally important to have in mind that the Third Defendant has no role to play in formulating the search terms. Accordingly, it could not prevent the snippet appearing in response to the user’s request unless it has taken some

positive step in advance. There being no input from the Third Defendant, therefore, on the scenario I have so far posited, it cannot be characterised as a publisher at common law. It has not authorised or caused the snippet to appear on the user's screen in any meaningful sense. It has merely, by the provision of its search service, played the role of a facilitator.

52. Analogies are not always helpful, but there will often be resort to analogy when the common law has to be applied to new and unfamiliar concepts. Here, an analogy may be drawn perhaps with a search carried out in a large conventional library. If a scholar wishes to check for references to his research topic, he may well consult the library catalogue. On doing so, he may find that there are some potentially relevant books in one of the bays and make his way there to see whether he can make use of the content. It is hardly realistic to attribute responsibility for the content of those books to the compiler(s) of the catalogue. On the other hand, if the compilers have made an effort to be more informative, by quoting brief snippets from the book, the position may be different. Suppose the catalogue records that a particular book contains allegations of corruption against a living politician, or perhaps it goes further and spells out a particular activity, such as “flipping” homes to avoid capital gains tax, then there could be legal liability on the part of the compiler under the “repetition rule”: see e.g. *Gatley on Libel and Slander* (11th edn) at paras 11.4 and 32.8.
53. No doubt it would be said here too, by analogy, that the Third Defendant should be liable for repeating the “scam” allegations against the Claimant. Yet, whereas a compiler of a conventional library catalogue will consciously at some point have chosen the wording of any “snippet” or summary included, that is not so in the case of a search engine. There will have been no intervention on the part of any human agent. It has all been done by the web-crawling “robots”.
54. The next question is whether the legal position is, or should be, any different once the Third Defendant has been informed of the defamatory content of a “snippet” thrown up by the search engine. In the circumstances before Morland J, in *Godfrey v Demon Internet*, the acquisition of knowledge was clearly regarded as critical. That is largely because the law recognises that a person can become liable for the publication of a libel by acquiescence; that is to say, by permitting publication to continue when he or she has the power to prevent it. As I have said, someone hosting a website will generally be able to remove material that is legally objectionable. If this is not done, then there may be liability on the basis of authorisation or acquiescence.
55. A search engine, however, is a different kind of Internet intermediary. It is not possible to draw a complete analogy with a website host. One cannot merely press a button to ensure that the offending words will never reappear on a Google search snippet: there is no control over the search terms typed in by future users. If the words are thrown up in response to a future search, it would by no means follow that the Third Defendant has authorised or acquiesced in that process.
56. There are some steps that the Third Defendant can take and they have been explored in evidence in the context of what has been described as its “take down” policy. There is a degree of international recognition that the operators of search engines should put in place such a system (which could obviously either be on a voluntary

basis or put upon a statutory footing) to take account of legitimate complaints about legally objectionable material. It is by no means easy to arrive at an overall conclusion that is satisfactory from all points of view. In particular, the material may be objectionable under the domestic law of one jurisdiction while being regarded as legitimate in others.

57. In this case, the evidence shows that Google has taken steps to ensure that certain identified URLs are blocked, in the sense that when web-crawling takes place, the content of such URLs will not be displayed in response to Google searches carried out on Google.co.uk. This has now happened in relation to the “scam” material on many occasions. But I am told that the Third Defendant needs to have specific URLs identified and is not in a position to put in place a more effective block on the specific words complained of without, at the same time, blocking a huge amount of other material which might contain some of the individual words comprising the offending snippet.
58. It may well be that the Third Defendant’s “notice and take down” procedure has not operated as rapidly as Mr Browne and his client would wish, but it does not follow as a matter of law that between notification and “take down” the Third Defendant becomes or remains liable as a publisher of the offending material. While efforts are being made to achieve a “take down” in relation a particular URL, it is hardly possible to fix the Third Defendant with liability on the basis of authorisation, approval or acquiescence.
59. These practical difficulties also impact upon the feasibility and effectiveness of injunctive relief. That is obviously a separate issue from that of responsibility for publication, but it is another illustration of the powerlessness of the Third Defendant to control what is thrown up by Google searches. The terms of the injunction sought in the prayer are purely formulaic and not tailored in any way to the practical difficulties the Third Defendant confronts:

“An injunction to restrain the Second and Third Defendants whether by themselves, their servants or agents, subsidiaries or otherwise, from publishing or causing to be published or authorising to be published the same or similar words defamatory of the Claimant within the jurisdiction of the court.”

Mr White points out that, quite apart from problems of enforceability against a foreign corporation, it would be to all intents and purposes technically impossible to comply with such an order if it is intended (as it plainly is) to prevent the offending words (or “similar words”) from appearing in a Google “snippet”. As Mr Lewis explained at para 23 of his first witness statement:

“In this case, the Claimant seeks an injunction preventing the display amongst search results of anything that suggests that the Claimant might be involved in a scam, without providing Google with the location of the materials in question. Doing so would be ineffective to block all results containing the

materials in question as well as overly broad by blocking perfectly legal materials. Filtering results based on the appearance of particular terms in the results page would not guarantee that all instances of the material in question would be effectively blocked from the search sites. Just as people may change the location or website of the materials, they likewise may present such material in a context that does not use exact phrases mentioned by the Claimant. In addition, any such filtering would simultaneously block thousands of websites without any unlawful content – and it would also under-filter missing differently-phrased, objectionable content. Bearing in mind the billions of (constantly changing) websites that are indexed by Google, such filtering is likely to have a serious negative effect on the speed, objectivity, accuracy and functioning of the search engine and would have a significant detrimental impact on any user of the service who may be trying to find information on the Internet.”

60. In his second witness statement, Mr Lewis added at para 16:

“We have conducted some searches to demonstrate the effect of an order being made in the terms sought, leaving aside for now the technical issue of whether such a course is in fact possible. These searches only involve the word ‘scam’. It is of note that the injunction sought extends to similar allegations. An extract from a thesaurus is attached ... We have not undertaken searches for each term, but it is clear from the results below that any restriction would result in a significant volume of lawful material being blocked on the Google search engine worldwide.”

He then continues to illustrate the search results for “Scheidegger”, “Scheidegger and scam”, taken together, and other uses of the word “scam”.

61. It will suffice, perhaps, for present purposes to consider the fourth search, which was by reference to the combination of “train”, “game” and “scam”. Of the first ten results, only the first related to the claimant and the snippet in question was not defamatory in any event. The others related to different matters and included what Mr Lewis describes as “public interest stories on text scams and a train quota scam”.
62. The Third Defendant has blocked access from www.google.co.uk to the specific URLs identified on behalf of the Claimant. This would not stop somebody, however, from searching on www.google.com. Nor would it prevent a third party who is responsible for the content of the site in question from moving it to a different web page, while giving it a different URL and avoiding the block. Thus, submits Mr White, it is practically impossible, and certainly disproportionate, to expect the Third Defendant to embark on a wild goose chase in order to determine where the words complained of, or some of them, might from time to time “pop up” on the Web.

63. On the other hand, the evidence suggests that it would be possible for the First Defendant to alter the code on its own website, either for the purpose of ensuring that the offending search results are not picked up by search engines generally or, of course, to remove the snippet from its own website. It is submitted, accordingly, that if the Claimant is to have an effective remedy it must lie against the First Defendant. For the reasons identified, an injunction against the Third Defendant would be a hopelessly inadequate substitute.
64. Against this background, including the steps so far taken by the Third Defendant to block the identified URLs, I believe it is unrealistic to attribute responsibility for publication to the Third Defendant, whether on the basis of authorship or acquiescence. There is no doubt room for debate as to what further blocking steps it would be open for it to take, or how effective they might be, but that does not seem to me to affect my overall conclusion on liability. This decision is quite independent of any defence provided by s.1(1) of the 1996 Act, since if a person is not properly to be categorised as the publisher at common law, there is no need of a defence: see e.g. *Bunt v Tilley* at [37].

The common law defence of innocent dissemination

65. The next issue to be considered is that of the common law defence of innocent dissemination, upon which the Third Defendant would wish to place reliance, in the alternative, if it is held to be *prima facie* liable for publication. First, however, Mr White would have to overcome the formidable argument that no such defence any longer exists, having been (in the words of Lord Mackay of Clashfern when the bill was before the House of Lords on 8 March 1996) “superseded” by s.1 of the Defamation Act 1996.
66. There is no direct authority on the point, although it was conceded (rightly or wrongly) in *Godfrey v Demon Internet* that the defence had actually been abolished. Mr White, however, relies upon a fundamental principle of statutory construction to the effect that Parliament should not be taken as effecting a fundamental alteration in the general law, by (say) abolishing a long established defence, unless it made this expressly clear in the statutory wording: see e.g. Bennion on *Statutory Interpretation* (4th edn), p693-4 and *National Assistance Board v Wilkinson* [1952] 2 QB 648, 661 (Devlin J). In my judgment, nothing in *Hansard* is sufficiently clear to resolve this question definitively.
67. The potential significance of this issue is that, on one interpretation of the law as it stood prior to 1996, a defendant could more easily satisfy the requirements of “innocent dissemination” than clamber over the hurdles set up by s.1 of the 1996 Act. One of the requirements to be fulfilled under this provision is that the defendant was not aware that the words complained of were “defamatory” (i.e. defamatory on their face) and had no reason to believe otherwise. The submission put forward by Mr White is that, by contrast, at common law a defendant could still have a defence if he was aware that the words in question were defamatory – provided that he had no knowledge that they were indefensible; in other words, knew positively that a defence of (say) justification, privilege or fair comment would fail.

68. Whether this view of the law is correct would appear to turn on whether one takes the same view as Scarman and Bridge LJ in *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 or that expressed by Lord Denning MR in his dissenting judgment. Mr White points out that all these remarks were, in any event, *obiter*. What Lord Denning MR had to say is to be found at p487E-G:

“The distributors of newspapers and periodicals are nothing more than conduit pipes in the channel of distribution. They have nothing whatever to do with the contents. They do not read them – there is no time to do so. Common sense and fairness require that no subordinate distributor – from top to bottom – should be held liable for a libel contained in it unless he knew or ought to have known that the newspaper or periodical contained a libel on the plaintiff himself: that is to say, that it contained a libel on the plaintiff which could not be justified or excused: and I should have thought that it was for the plaintiff to prove this. And the Restatement bears this out: see *Restatement, Torts* 1965 Supplement, section 581, Comment. I have read every case cited in the textbooks on this subject and I find that a subordinate distributor has never been held liable to a plaintiff except when prior knowledge of the libel has been brought home to him.”

69. A good deal of steam seems to have been generated by this hearing in the Court of Appeal, as Scarman and Bridge LJ expressed their disagreement with the Master of the Rolls in unusually strong terms: see e.g. the observations of Bridge LJ at p598C-F. Mr White is quite right to emphasise that the remarks were *obiter*, since one of the reasons for their strong disagreement was that the point in question had not been argued properly before the court. At all events, the remarks of Bridge LJ in the particular context of innocent dissemination, at p505A-B, were as follows:

“The legal background, with which all parties to the settlements must be taken to have been familiar, is that any disseminator of defamatory matter is liable to the party to be defamed, subject to the defence of innocent dissemination. To establish this it is for him to show that he did not in fact know that the publication contained defamatory matter and that he had no reason to believe that it was likely to contain defamatory matter ... ”

Mr White invites me to take the same view of the defence of innocent dissemination as that of Lord Denning MR and to hold that his client would not be liable unless it could be shown that he was positively aware that any defence would fail. There is no other support for that view of the law available. It depends entirely on adopting the reasoning of Lord Denning MR. I should do so, says Mr White, because the common law is obviously uncertain and I should err on the side of protecting his client’s Article 10 rights (and, for that matter, the rights of those who use search engines). I have considerable difficulty with doing so, however, because it seems to me that the defence of innocent dissemination as interpreted by Lord Denning MR throws up more problems than it is likely to solve. How could someone hoping to avail himself

of the defence *know* that a defence of justification was bound to fail, save in the simplest of cases? How is he/she to approach the (often controversial and uncertain) question of meaning? How much legal knowledge is to be attributed to him/her in arriving at these conclusions? What of a possible *Reynolds* defence?

70. It is a somewhat curious situation in that I am being asked, 13 years after the common law defence was, at least, superseded, to determine how it should have been construed in its heyday. Nevertheless, it is right that I should state my conclusion on both the issues now raised. I am prepared to find that the defence was not actually abolished in 1996 (albeit no doubt effectively superseded). I have come to that conclusion because the statute does not say that the common law defence is indeed abolished (as, for example, it was made clear when the tort of detinue was abolished in 1977). In the event, however, it makes very little difference and does not assist Mr White's argument. It would almost certainly not be available to a defendant who has had it drawn to his attention that the words are defamatory or, at least, arguably so. To that extent, the common law defence is much more closely in line with the statutory defence introduced in s.1 of the 1996 Act. Indeed, it is quite likely, if Lord Mackay had thought that there was a significant difference between the scope of the common law defence and that of the proposed statutory one he was commending to Parliament, that the government would have addressed the question directly and decided either to retain the distinctions or to abolish them expressly.

The statutory defence in the Defamation Act 1996

71. Mr White turned next to the provisions of s.1(1) of the Defamation Act 1996:

“In defamation proceedings a person has a defence if he shows that –

- (a) he was not the author, editor or publisher of the statement complained of,
- (b) he took reasonable care in relation to its publication, and
- (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.”

There is some confusion about the terminology in this part of the statute because, whereas in most places the notion of “publication” corresponds with the general usage in the law of defamation, “publisher” is defined in s.1(2) to mean “a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business”. The different usage is recognised in s.17(1) of the Act, which is the interpretation section.

72. The relevant “statement complained of” against the Third Defendant is, of course, the “snippet” thrown up by the search engine rather than any publication occurring on the

73. First Defendant's website. It is only the First Defendant itself which is sued in respect of the original website publication.
74. This dual usage of "publisher" in the Act is apt to cause particular confusion in the present context. The Third Defendant would appear to be a business which issues material to the public, or a section of the public. Yet the common law test of whether the Third Defendant published the words complained of is not necessarily the same as that under the statute of whether it "issues material containing the statement in the course of that business".
75. Mr White submits that the second hurdle, relating to "reasonable care", is easily overcome in the present case. I found this difficult to comprehend, however, in a case where the publication (if that is what it was) took place without any human input on the part of the Third Defendant. The throwing up of the relevant "snippet" was brought about entirely by the search terms of the web user.
76. Mr Browne QC, on behalf of the Claimant, submits that s.1 of the 1996 Act simply has nothing to do with the present circumstances. It is directed towards protecting those who play a minor ancillary role in distributing the defamatory allegations of others. No one here suggests that the Third Defendant is responsible for the publications on the First Defendant's website. It is sued solely in respect of the "snippet", in respect of which, according to Mr Browne, it is plainly the "publisher".
77. There is little judicial authority on the construction of s.1. It was considered by Morland J in *Godfrey v Demon Internet*, where he was concerned with the role of an Internet service provider (ISP) rather than a search engine. He expressed his conclusion at p206D-E:
- "In my judgment the defendants were clearly not the publisher of the posting defamatory of the plaintiff within the meaning of section 1(2) and (3) and incontrovertibly can avail themselves of section 1(1)(a). However the difficulty facing the defendants is section 1(1)(b) and (c). After 17 January 1997, after receipt of the plaintiff's fax, the defendants knew of the defamatory posting but chose not to remove it from their Usenet news servers. In my judgment this places the defendants in an insuperable difficulty so that they cannot avail themselves of the defence provided by section 1. ... "
78. The judge explained the policy underlying both the new provisions in the statute and the original defence of innocent dissemination at common law, partly by reference to what had been said by Lord Mackay of Clashfern in Parliament on 2 April 1996, at Hansard (HL Debates) 2 April 1996, cols 214-215, and partly by reference to the contents of a consultation document issued by his department in July 1995 under the title "Reforming Defamation Law and Procedure". He came to the conclusion that the defence was not intended to protect those who knew that the material they were handling was defamatory at the time of publication. It was supposed to be available only if, having taken all reasonable care, the defendant had no reason to suspect that his act involved or contributed to a publication defamatory of the relevant claimant.

This was why, once it had been notified of the defamatory nature of the posting, the ISP would be subject to legal responsibility for publication. Having the power to remove it, it had chosen not to do so.

79. It is obvious that the present scenario is very different because the Third Defendant is not hosting a website and does not have anything from which to “take down” the offending words.
80. Mr White drew a further distinction, suggesting that the remarks of Morland J in *Godfrey v Demon Internet* are not directly relevant because this, unlike the case before him, is a “triangular case”. What he means by this is that the First Defendant and the publication on its website are also involved. This appears to me to be irrelevant, since the “statement” complained of is contained in the “snippet” thrown up by the Third Defendant’s search engine. We are not, in the present context, directly concerned with what appeared on the First Defendant’s website. What seems to me to be more important is the significance of notification to the proprietor of a search engine. As I have said, the Third Defendant is not in a position to “take down” the offending words in the way that Demon Internet could have done.
81. There is no need to address the possible defence under s.1 of the 1996 Act in the light of my finding in the Third Defendant’s favour on primary liability. If, however, it should correctly be considered as a “publisher”, contrary to my conclusion, it is difficult to see how it would then qualify under s.1(1)(a).

The potential relevance of the 2002 Regulations

82. Mr White placed reliance also upon the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002 No 2013). As the title suggests, these regulations were enacted by Parliament in order to give effect to the European directive of 8 June 2000. This is concerned with certain aspects of what are called “information society services” within the internal market. The principal objective is to contribute towards the proper functioning of internal markets by ensuring the free movement of information society services between member states. It is made clear by Recital 17 that the pre-existing definitions of “information society services” cover “... any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and the individual request of a recipient of a service”.
83. It is difficult to see how the Third Defendant’s search engine service could, in any ordinary meaning of the term, be described as “for remuneration” in circumstances where the user of the Web does not pay for the service. It is true that remuneration is obtained through advertising, but it would be a distortion of language to describe the service as being “for remuneration” purely for that reason. This would normally mean that the person receiving the service was having to pay. Much may depend, however, on specific statutory definitions.
84. It is said in Recital 18 that:

“Information society services span a wide range of economic activities which take place on-line; these activities can, in

particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications or those providing tools allowing for search, access and retrieval of data; ...”

Under this extended definition, it would appear that search engines would be embraced. Reference was made to what had been said in *Bunt v Tilley* at [40]:

“ ... It was made clear in the recitals that one of the objectives was to remove ‘existing and emerging disparities in member states’ legislation and case law concerning liability of service providers acting as intermediaries’, because it was necessary to avoid their preventing the smooth functioning of the internal market – in particular by impairing the development of cross-border services and producing distortions of competition: see recital 40. There is recognition that service providers may be obliged on occasion to act in order to prevent or stop unlawful activities. It was plainly thought desirable that the position should be made as clear as possible.”

85. The Regulations in this jurisdiction adopt, at Regulation 2, the definition of “information society service provider” from the Directive, including its reference to the service being “provided for remuneration.” But, as I have pointed out, Recital 18 of the Directive would appear to extend the definition more widely. The learned editors of *Gatley on Libel and Slander* (11th edn) comment, at para 6.28, that:

“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.”

Although the matter is by no means free from doubt, it would appear on balance that the provisions of the 2002 Regulations are apt to cover those providing search engine services.

86. Some member states have decided to provide expressly that search engines should be protected. Moreover, it has been noted here, in a consultation paper on the Electronic Commerce Directive published by the Department of Trade and Industry in 2005, that “Whilst it was not necessary for member states to extend the provisions of Articles 12 to 14 of the Directive to cover ... location tool services [i.e. search engines] to correctly implement the Directive, the Commission encouraged member states to further develop legal security by so doing”. The United Kingdom has, to date, not

chosen to extend the Regulations expressly to cover search engines. This would appear to be on the basis that no cases have emerged suggesting that such a protection is necessary. The position may well be reconsidered if the European Commission publishes a further review.

87. In this jurisdiction, the Law Commission in December 2002 expressed the view that it is unclear whether the provision of a link to a site containing a defamatory statement, for example via a search engine, would amount to secondary publication: see *Defamation and the Internet*, Scoping Study 2.
88. It is necessary to consider the terms of Regulations 17, 18 and 19, which were intended to give effect to Articles 12 to 14 of the Directive. It is important to note, however, that in so far as these regulations afford protection, it is only against claims for damages. It would not cover injunctive relief.
89. Regulation 17 is concerned with “mere conduit”:
- “(1) Where an information society service is provided which consists of the transmission in a communication network of information provided by a recipient of the service or the provision of access to a communication network, 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 transmission where the service provider –
- (a) did not initiate the transmission;
 - (b) did not select the receiver of the transmission; and
 - (c) did not select or modify the information contained in the transmission
- (2) The acts of transmission and of provision of access referred to in paragraph (1) include the automatic, intermediate and transient storage of the information transmitted where:
- (a) this takes place for the sole purpose of carrying out the transmission in the communication network, and
 - (b) the information is not stored for any period longer than is reasonably necessary for the transmission.”
90. It is unclear whether this protection would extend to a cached index, such as that of the Third Defendant, which is created automatically (by the so called “knowledge bots”) and in relation to the operation of the search engine. But Mr White draws my attention to the fact that in Austria, where statutory provisions have been introduced, by way of implementing the Directive, they were amended so as to extend the protection contained in Article 12 of the Directive to search engines. This is referred to, for example, in the DTI consultation document published in June 2005:

“4.2 The Austrian authorities’ reason for the extension of the scope was the uncertain legal situation for hyperlinkers in Austria. The Austrian High Court had determined that a service provider could be liable for the information or activity of a third party, which contravened competition law. The Court expressed the view that a service provider may be liable on the same basis in tort and under penal provisions. The Austrian authorities considered that the effect of these decisions was to disturb the general principles and aims of the Electronic Commerce Directive. The authorities also considered that the legal status of location tool providers was not made clear. As a result, the Austrian Electronic Commerce Act, which implements the Directive, was amended to extend the protections in Article 12 to providers of location tool services, as the authorities considered the services were similar to the services of a mere conduit. ...”

91. Obviously Regulation 17 would be of no relevance if I am correct in my primary conclusion that the Third Defendant would not be liable for publication any way, purely as a matter of the applying common law principles.
92. Regulation 18 is concerned with caching. (A fairly full explanation of this function is to be found in the evidence before the court in *Bunt v Tilley* set out at [52].) The terms of the Regulation are as follows:

“Where an information society service is provided which consists of the transmission in a communication network of information provided by a 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 transmission where –

(a) the information is the subject of automatic, intermediate and temporary storage where that storage is for the sole purpose of making more efficient onward transmission of the information to other recipients of the service upon their request, and

(b) the service –

(i) does not modify the information;

(ii) complies with conditions on access to the information;

(iii) complies with any rules regarding the updating of the information, specified in a manner widely recognised and used by the industry;

(iv) does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(v) acts expeditiously to remove or to disable access to the information he has stored upon obtaining actual knowledge of the fact the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.”

93. It is submitted by Mr White that the provisions of Regulation 18 correspond more closely to the functioning of a search engine. It is explained by Dr Collins, *op. cit.* at para 17.12, that this is intended to protect Internet intermediaries from liability in respect of material for which they are not the primary host, but which they store temporarily on their computer systems for the purpose of enabling the efficient availability of Internet material. He adds that there is a degree of tension between the various requirements. In particular, the Regulation applies only to information which is stored on an “automatic” basis but, on the other hand, it would be necessary for an intermediary seeking to rely on the provisions to demonstrate that it has complied with conditions on access and rules on updating. The latter may require human intervention, whereas clearly the former does not. He suggests that, in order to maximise the prospect of being able to rely on the Regulation, intermediaries should develop policies and procedures –

- i) setting out how they select and obtain cached content;
- ii) acknowledging that the sole purpose of the caching is to facilitate the efficient onward transmission of the cached content to recipients of the service upon request;
- iii) prohibiting the modification of the content;
- iv) identifying how regularly they update and delete cached content; and
- v) facilitating the expeditious removal or disabling of access to information in the circumstances identified in Regulation 18(b)(v).

It may be of some relevance in this context that the automatic process which produces snippets for web users often involves a process of selection and “editing”, albeit automatic, in order to provide a brief summary of the primary content on the relevant web page. This might be classified as “modification of the content”.

94. Regulation 19 is concerned with hosting:

“Where an information society service is provided which consists of the storage of information provided by a 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 the control of the service provider.”

95. Dr Collins also provides a commentary on this provision at para 17.21:

“Regulation 19 is intended to apply to Internet intermediaries who store Internet content, such as web pages and bulletin board postings, on their computer systems. An example of a ‘host’ is Demon Internet, on the facts in *Godfrey v Demon Internet Ltd*. Regulation 19 would not apply, however, where the author of the particular defamatory content was an agent or employee of the intermediary, because in those cases the author would ordinarily be acting ‘under the authority or the control’ of the intermediary within the meaning of regulation 19(b). An example of this kind of content might be a gossip column prepared by a third party, but commissioned by an ISP and available from that ISP’s homepage.”

96. Mr White suggests that the test of “actual knowledge” in Regulation 19(a)(i) offers an “extended protection”, as being closer to his own interpretation of the common law defence of innocent dissemination (i.e. that based on Lord Denning’s interpretation, considered above).

97. The important questions would appear to be (a) whether the Third Defendant needs a defence under these Regulations at all (i.e. whether it was a publisher) and (b) whether, if it does, it would qualify as “hosting”.

The European perspective

98. In view of the uncertainty as to the boundaries of these statutory defences, Mr White asks me to consider what he called “the wider European and policy perspective”, in order to avoid my coming to an interpretation of English law that is inconsistent. I do not propose to spend much time addressing these matters, although it is interesting to note them in passing. The European Commission has encouraged member states to

extend protection to search engines, since the borderless nature of e-commerce was thought to require that the framework put in place for its operation should provide legal certainty both for business and consumers: see the observations made in the Commission's first report on the Directive, dated 21 November 2003.

99. It seems that by June 2005, when the DTI consultation paper was issued, four member states and Liechtenstein had afforded some measure of extended protection to search engine services.
100. I have already referred to the Austrian legislation. The legislature in Spain enacted Law 34/2002 so as to extend the "hosting" protection to search engines. There will, however, be liability if there is actual knowledge that the information to which a link is provided is unlawful or infringes third party rights. Nevertheless, actual knowledge is given a somewhat restricted interpretation. Such knowledge will only be attributed when it has been declared by a "competent body" that the information is unlawful, or such a body has ordered that the information be removed or access disabled. Thus, it would appear that notice from a complainant as to material being allegedly defamatory would not suffice (by contrast with the decision in *Godfrey v Demon Internet*). Mr White therefore submits:
- "The presumption here is clear; it is in favour of the search engine's freedom to operate and against any presumption that the content of its search results should be supervised by the search engine."
101. Mr White also drew my attention to a Spanish court decision specifically relating to the Third Defendant. This was a recent case in the Court of First Instance in Madrid on 13 May 2009: *Palomo v Google Inc*. The complaint was in relation to search results providing hyperlinks to sites carrying defamatory content. The claim was rejected and the Third Defendant held not liable in law for disseminating third party content. Reference was made to European legislation moving towards the position that there should not be any obligation on Internet intermediaries to supervise such content. Where "actual knowledge" (in the sense defined above) has not been established, the law provides for "exoneration from responsibility" on the part of businesses offering intermediary services.
102. Portugal has also extended the limitation on liability in respect of "hosting" to search engines. It would appear from the DTI consultation paper, referred to above, that there is a similar provision as to "actual knowledge" to that provided for in the Spanish legislation.
103. Hungary has extended the limitation in relation to "hosting" to search engines and there is no requirement that the search engine should have no knowledge of the statement complained of.
104. The position is similar in Liechtenstein.
105. In the course of the hearing before me, it was discovered by Mr White that two other member states had implemented the Directive in such a way as to provide extended protection for search engines. Bulgaria enacted an Electronic Commerce Act in

December 2006 which provides that an automated search engine service shall not be liable for the contents of data obtained where it has not (i) initiated the transmission of the data, (ii) chosen the data recipient, or (iii) chosen or altered the data obtained. This corresponds to the provisions of the Austrian amendment, to which I have referred above.

106. Romania has also extended its law to provide express protection for search engine services in Article 15 of Law No 365 of 7 June 2002, dealing with Electronic Commerce. This provides for protection if the search engine service was not aware that the information in question was illegal, and not aware of any facts or circumstances showing that the information could prejudice the rights of a third party. If it is so aware, it may still be protected if it acts rapidly to eliminate the possibilities of access or to block its use. The search engine service is responsible for the information when a public authority has determined that it is illegal. There are similar limitations on liability to those I have identified with reference to the Spanish law.
107. Mr White also drew my attention to a number of judicial decisions concerning his client. In each case the court refused to hold the Third Defendant (or a local representative) liable for the secondary act of publishing words originating from third parties.
108. In the Swiss decision of *Subotic v Google Inc* (in the First Instance Court in Geneva) the claim was in respect of hyperlinks to external sites said to contain defamatory words. A general comment was made about the positions of search engines to the following effect (in translation):

“To order Google to remove all the concerned links or the key word ‘Stanko Subotic’ would consist, according to several texts, in a breach of the freedom of expression and would be contrary to the exhaustive results that any search engine research aims at providing. Indeed, although most of the above mentioned authors and organisations provide for an obligation to remove links on several conditions, they also agree, together with this court, that restrictive conditions must limit such a possibility, in particular with respect to precision.”

As so often, however, the court’s refusal of relief turned to a large extent upon its own facts.

109. Another recent example was the French decision (Court of Appeal in Paris, 19 March 2009): *SARL Publison System v SARL Google France*. The claimant sued over a defamatory “snippet” raised by Google’s search engine and a hyperlink to the primary site. It was held that a search engine was not under any duty to assess the lawfulness of the indexed website. To the extent that it involves an indexing robot, and neither creates nor hosts the disputed information, it was said that Google was not under any automatic obligation to carry out monitoring. Furthermore, in view of the considerable volume of information arriving each day on Internet sites, the operator of the search engine was unable to analyse the content made available to users via its indexes.

110. I have already referred to the Spanish decision of *Palomo v Google Inc.*
111. There was also a Dutch decision in the District Court of Amsterdam on 26 April 2007: *Jensen v Google Netherlands*. An attempt was made to obtain an injunction to prevent Google from displaying the search results displayed on a search of the claimant's name (since there were a number of sex websites). The court observed that:
- “Google has made it sufficiently clear that it has no (preventive) involvement with or influence over the contents of the links to the websites and with or over the contents of the websites which are automatically obtained as search results after entering of, in the case in hand, the search term Jensen + Urmia + Brigitte.”
- Attention was drawn to the “technical, automatic and passive nature” of the technical processes involved (i.e. of crawling, index-linking and ranking). Google was not expected to accept responsibility for the outcome of a search instruction or the content of the search results. It is to be noted, however, that the court relied in part upon the lack of knowledge on the part of Google that the information was wrongful.
112. In the light of this material, Mr White submits that the overwhelming conclusion is that search engines, as with other Internet intermediaries, have features which are unique and require extended protection. It would be unnecessary and disproportionate to impose a condition that the defence in s.1 of the 1996 Act should only be available if the Internet intermediary does not have notice of a complaint of a defamatory statement. In other words, he invites me to take a different approach from that of Morland J in relation to the ISP in the case before him. Any other interpretation in an English court would undermine the policy of the European Commission as identified in the Directive. In particular, there would be disadvantages for businesses in this jurisdiction which would be inconsistent with the objective of an open and free internal market.
113. As I have already indicated, the United Kingdom government has so far taken the view that it is unnecessary or inappropriate to extend protection expressly to search engines. It would not be appropriate, therefore, for me to proceed as though there were a comparable statute in effect in this jurisdiction. I think that, for the Third Defendant to be classified as or deemed a “host”, statutory intervention would be needed.
114. I prefer to reach my conclusion by reference to straightforward common law principles, albeit adapted to the new environment of the Internet, and in particular I attach importance to the absence of knowledge on the part of the Third Defendant in relation to the offending material prior to the Claimant's complaint and, moreover, the absence of any conduct on its part thereafter which could properly be characterised as authorisation or acquiescence in continuing publication. There may have been delays in the “take down” procedure (whether for technical or other reasons), but even while the attempt is being made to block access to any specific URL, it is impossible to

characterise the state of mind of any relevant employee as amounting to authorisation, approval or acquiescence.

115. I believe that my conclusion, although it is an attempt to apply common law principles, is not likely to give rise to any inconsistency with the way that matters are approached in other European jurisdictions or with an open and free internal market.

The position in the United States

116. I do not propose to spend time in this judgment addressing the legal position in the United States, as to which I received an expert opinion from Mr Patrick J Carome.
117. I naturally accept that any injunction granted in these proceedings against the Third Defendant (or, for that matter, the First Defendant) would not be likely to be enforceable in the United States. That would not necessarily be a conclusive reason against allowing the proceedings to go on, or even against the grant of an injunction at the end of a trial: see e.g. *Re Liddell's Settlement Trusts* [1936] Ch 365, 374. Some litigants find it worthwhile to have a determination of rights or issues on the record irrespective of enforceability.
118. I accept also that there have been a number of decisions in the United States, as one would expect, which on public policy grounds afford protection to Internet intermediaries, including the operators of search engines. There is nevertheless encouragement for voluntary self-regulation.
119. There is an important provision contained in s.230 of the Federal Communications Decency Act, 47 United States Congress, to the effect that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”. None of this, however, directly impinges on the decisions I have to make.

The separate ground for discharge based on misrepresentation before the Master

120. As I have indicated, there is a distinct ground for setting aside the Master’s order based on alleged misrepresentation. The witness statement placed before the Master gave the impression that the Claimant’s case was in part founded upon the proposition that the Third Defendant was responsible for the publication of both threads of the First Defendant’s forum that are complained of in the particulars of claim. A similar error was made in the draft of the particulars of claim placed before the Master, which itself alleged that the Third Defendant was responsible at least for publication of the “Train2Game” thread. This was corrected, but only after permission had been given to serve out.
121. Another problem is that the Claimant failed to draw the court’s attention to any of the difficulties of establishing liability or potential defences on the part of the Third Defendant. Moreover, as I have remarked at [8] above, it was asserted in the particulars of claim that the Second Defendant was also responsible for the publication of information derived from Google searches. The case presented to the Master was that it was “highly likely” that the Second and Third Defendants were joint tortfeasors. This was persisted in despite the explanation given to the Claimant’s

solicitors as to the separate function of the Second Defendant. It is not clear to me why this was done.

122. Such inaccuracies and omissions should not be treated as mere technicalities. As long ago as the decision in *Société Générale de Paris v Dreyfus Bros* (1885) 29 Ch D 239, the court was acknowledging how serious it was for a foreigner to be troubled by English proceedings. In the light of this, it was said that “... the Court ought to be exceedingly careful before it allowed a writ to be served out of the jurisdiction”.
123. Many years later, having referred to that principle, Burton J in *Network Telecom (Europe) Ltd v Telephone Systems International Inc* [2003] EWHC 2890 (QB) at [56] made the following pertinent comment:

“Inasmuch as the application is made *ex parte*, full and fair disclosure is necessary, as in all *ex parte* applications, and the failure to make such full and fair disclosure shall justify the court in discharging the order, even though the party might afterwards be in a position to make another application.”

As I have already noted, the learned Judge did not regard it as making any difference in that case that the Master took the view that he had not been materially misled.

124. I have acknowledged that the misrepresentation which took place was probably due to inadvertence, and perhaps to some extent to technical “glitches”, but nevertheless it seems to me that the strict approach taken in the *Dreyfus Bros* case is equally appropriate in the present case. Insufficient care was taken. If it were necessary, I would regard the misrepresentation here as being of sufficient materiality to justify setting aside the order by itself.

The ultimate outcome

125. In conclusion, therefore, there are two reasons which in my judgment justify setting aside the Master’s order. First, I do not consider that on the evidence before me the Third Defendant can be regarded as a publisher of the words complained of, whether before or after notification. Accordingly, on the evidence before me, I can conclude that the Claimant would have “no reasonable prospect of success”. Secondly, I regard the misrepresentations and omissions, as to the nature of the cause of action relied upon, as sufficiently serious to justify setting aside the Master’s order in any event.