

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Mr Justice Eady

[2012] EWHC 449 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2013

Before :

THE MASTER OF THE ROLLS

LORD JUSTICE RICHARDS

and

LORD JUSTICE SULLIVAN

Between :

Payam Tamiz

- and -

Google Inc

Appellant

Respondent

Godwin Busuttil (instructed by **Brett Wilson LLP**) for the **Appellant**
Antony White QC and Catrin Evans (instructed by **Reynolds Porter Chamberlain LLP**) for
the **Respondent**

Hearing dates : 3-4 December 2012

Judgment

Lord Justice Richards :

1. The respondent, Google Inc, is a corporation registered in Delaware and with its principal place of business in California. It provides a range of internet services including Blogger (also referred to as Blogger.com), a service based and managed in the USA but available worldwide. Blogger is a platform that allows any internet user in any part of the world to create an independent blog (web log). The service includes design tools to help users create layouts for their blogs and, if they do not have their own URL (web address), enables them to host their blogs on Blogger URLs. The service itself is free of charge but bloggers can sign up to a linked Google service that enables them to display advertisements on their blogs, the revenues from which are shared between the blogger and Google Inc.
2. One of the blogs hosted on Blogger bears the name “London Muslim”. The appellant, Mr Tamiz, complains that eight specific comments posted on the London Muslim blog between 28 and 30 April 2011 were defamatory of him. There is an issue, considered below, as to when any complaint was first notified by him to Google Inc. It is common ground, however, that his letter of claim was received by Google Inc in early July 2011; that on 11 August 2011, after further email exchanges, the letter was forwarded to the blogger; and that on 14 August 2011 the blogger voluntarily removed all the comments about which complaint is made.
3. The appellant seeks to bring a claim in libel against Google Inc in respect of the publication of the allegedly defamatory comments during the period prior to their removal. He was granted permission by Master Eyre to serve the claim form on Google Inc in California. On Google Inc’s subsequent application, however, Eady J held that the court should decline jurisdiction and that the Master’s order for service out of the jurisdiction should therefore be set aside. The judge’s order to that effect is the subject of the present appeal. The judge also held that Google UK Ltd had been joined in the proceedings inappropriately and that there was no triable claim against it. There is no appeal against that aspect of his decision.
4. In summary, Eady J found that three of the comments were arguably defamatory but that on common law principles Google Inc was not a publisher of the words complained of, whether before it was notified of the complaint or after such notification. If, contrary to that view, Google Inc was to be regarded as a publisher at common law, section 1 of the Defamation Act 1996 (“the 1996 Act”) would provide it with a defence, in particular because it took reasonable care in passing the complaint on to the blogger after it had been notified of it. At this point of his judgment Eady J also indicated his acceptance of a submission that the period between notification and removal of the offending blog was so short as to give rise to potential liability on the part of Google Inc only for a very limited period, such that the court should regard its potential liability as so trivial as not to justify the maintenance of the proceedings, in accordance with the principles in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946. Nevertheless he went on to consider an alternative defence under regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002 (“the 2002 Regulations”), which he held would provide Google Inc with a defence if it were otherwise needed.
5. The main issues in the appeal, taking them in the order in which they were considered by the judge below, are (1) whether there is an arguable case that Google Inc was a

publisher of the comments, (2) whether, if it was a publisher, it would have an unassailable defence under section 1 of the 1996 Act, (3) whether any potential liability was so trivial as not to justify the maintenance of the proceedings, and (4) whether Google Inc would have a defence, if otherwise necessary, under regulation 19 of the 2002 Regulations.

6. Before considering those issues it is necessary to say a little more about various background matters.

The comments themselves

7. An article in the *Evening Standard* on 27 April 2011 contained an allegation that the appellant had resigned as a Conservative Party candidate for local elections in Thanet after it had been discovered that his Facebook site referred to women as “sluts”. The appellant sued separately in respect of that article and the proceedings were settled by a consent order. The topic was picked up in an article posted on the London Muslim blog on 27 April. This gave rise to a number of comments posted anonymously over the next three days. The comments complained of are set out in Eady J’s judgment at [7]. The judge held that five of the comments could be characterised in this context as “mere vulgar abuse” to which no sensible person would attach much, if any, weight (see *Smith v ADVFN Plc* [2008] EWHC 1797 (QB) at [13]-[17], and *Clift v Clarke* [2011] EWHC 1164 (QB) at [32] and [36]). He found, however, that three of the comments (Comments A, B and D) were arguably defamatory. They included allegations that the appellant was a drug dealer, had stolen from his employers and was hypocritical in his attitude towards women.
8. The arguments on the appeal included a brief submission that the judge ought also to have found other comments to be arguably defamatory: in particular, Comment E which contained a suggestion that the appellant had made a fake asylum claim. But the judge directed himself correctly and I see no sufficient basis for interfering with the assessment he made on this issue.

Notification of the complaint

9. On the evidence before him, the judge dealt with the factual issue of notification as follows:

“15. According to Mr Tamiz, he first notified his complaint on 28 or 29 April 2011 (i.e. as the postings were taking place) when he used the “Report Abuse” function on the relevant web page. What became of this remains unclear.

16. A letter of claim was sent on 29 June to Google UK Ltd, which was received on 5 July. This complained of the original article, as being defamatory and untrue, although it was not subsequently sued upon in these proceedings. Complaint was also made of what is now described as Comment A. This letter was passed by Google UK Ltd to Google Inc, which responded to Mr Tamiz by email on 8 July. Clarification was sought as to whether the comment in question was said to be untrue, since his letter had not apparently made that clear. It was at this

stage that it was pointed out to Mr Tamiz that the blogger service had nothing to do with Google UK Ltd.

17. Mr Tamiz responded promptly on 8 July to the effect that Comment A was indeed “false and defamatory”. At this stage, he introduced a complaint about Comment B as well.

18. The ‘Blogger Team’ within Google Inc sent a further email to Mr Tamiz on 19 July, seeking his permission to forward his complaint to the author of the blog page. He was told, however, that Google Inc itself would not be removing the post complained of. Mr Tamiz responded by giving the necessary permission on 22 July.

19. In that email of 22 July, Mr Tamiz complained about a further five comments on the blog, now identified as Comments C, D, E, F and G. He confirmed that these were alleged to be defamatory and it seemed to be implicit also that he was characterising them as untrue.

20. After considerable delay, Google Inc forwarded the letter of claim to the blogger on 11 August of last year and informed Mr Tamiz that it had done so. As I have said, on 14 August the article and all the comments were removed by the blogger himself. Mr Tamiz was accordingly notified by Google Inc the following day”

10. In his particulars of claim the appellant alleged that between 29 April and the letter of claim he made various telephone calls to Google UK Ltd and sent two letters, dated 29 April and 23 May, to that company’s offices. Those allegations were not admitted by the defendants and were not supported by evidence at the hearing before Eady J. The defendants also contended that communications to Google UK Ltd were not capable of constituting notification to Google Inc. The transcript of the hearing makes it tolerably clear that the appellant was content in the event to proceed on the basis that the date of notification of the complaint to Google Inc was the date when the letter of claim was forwarded to Google Inc by Google UK Ltd, which fell between 5 July (when Google UK Ltd received the letter) and 8 July (when Google Inc first contacted the appellant by email). All this fits with the way the judge dealt with the matter in the passage quoted above.
11. The appellant has applied to adduce fresh evidence on the appeal, in the form of a witness statement in which he gives detailed further information about the Blogger service and about his dealings with Google UK Ltd and Google Inc, exhibiting *inter alia* copies of the two letters allegedly sent by him to Google UK Ltd. If that evidence is admitted, Google Inc applies to adduce fresh evidence in response, by way of a witness statement asserting that Google UK Ltd has no record of receiving any telephone calls or letters from the appellant prior to the letter of claim, and giving an update on the procedure for complaints about postings on Blogger.
12. *Ladd v Marshall* [1954] 1 WLR 1489 remains central to the exercise of the court’s discretion as to the receipt of fresh evidence under CPR 52.11(2) (see the discussion

at para 52.11.2 of Civil Procedure 2012). The first condition in *Ladd v Marshall* is plainly not met in this case: the evidence the appellant now seeks to adduce could have been obtained with reasonable diligence for use at the hearing below. Indeed, in practice the issue to which the evidence relates fell away at that hearing, since the appellant was content to proceed on the narrower basis that the letter of claim constituted notification of his complaint. I bear in mind that at that stage of the proceedings he was representing himself but I attach relatively little weight to that consideration because he is a law graduate and, as appears from the transcript of the hearing, is intelligent and articulate. Taking everything into account, I do not consider that the case for admission of the fresh evidence has been made out. The issues in the appeal ought in my view to be determined on the factual basis on which the judge proceeded.

Google Inc's policy

13. Google Inc's policy towards the content of blogs hosted by Blogger at the material time is set out in a witness statement of Mr Jaron Lewis, a solicitor with conduct of the company's case:

“9. Blogger.com is not involved with the creation of content that people post on their blogs. It does not create, select, solicit, vet or approve that content, which is published and controlled by the blog owners

10. Blogger.com does operate a ‘Content Policy’ which sets out restrictions on what users can do using the service This makes clear that content such as child pornography, or promoting race hatred, is prohibited. The policy is explained in the following terms:

‘Blogger is a free service for communication, self-expression and freedom of speech. We believe that Blogger increases the availability of information, encourages healthy debate and makes possible new connections between people.

We respect our users’ ownership of and responsibility for the content they choose to share. It is our belief that censoring this content is contrary to a service that bases itself on freedom of expression.

In order to uphold these values, we need to curb abuses that threaten our ability to provide this service and the freedom of expression it encourages. As a result, there are some boundaries on the type of content that can be hosted with Blogger. The boundaries we have defined are those that both comply with legal requirements and that serve to enhance the service as a whole.’

11. [Google Inc] also operates a ‘Report Abuse’ feature There are eight grounds for reporting abuse, and users have to select one of these. The eight listed are ...

- Defamation/Libel/Slander

...

12. If the user selects ‘Defamation/Libel/Slander’, which is what appears to have happened in this case ..., a second screen is displayed.

13. The second screen makes clear that the Blogger.com service is operated in accordance with US law, and that defamatory material will only be taken down if it has been found to be libellous (i.e. unlawful) by a court. The reason for this policy is that under US law, [Google Inc] is not a publisher of third party content hosted on blogspot.com. US law works on the basis that claimants must raise their defamation issues directly with the author of the material, not third party service providers such as Blogger.com.

14. Given the volume of content uploaded by users of the Blogger service, it is usually not practicable for [Google Inc] to remove content without first receiving the Court’s determination that the content is, in fact, libellous. Google is not in a position to adjudicate such disputes itself.”

14. In this case Google Inc appears to have gone slightly further than the stated policy, in that the email of 11 August 2011 by which it passed on to the blogger the details of the appellant’s complaint contained an actual *request* to “please remove the allegedly defamatory content in your blog within three (3) days of today’s date”. The blogger complied with that request.

Whether Google Inc was a publisher of the comments

15. The appellant’s pleaded case relates to the period *after* Google Inc had been notified of his complaint. As Eady J observed, it is therefore only necessary to assess potential legal liability from the point of notification. Nevertheless the judge’s reasons and the arguments in this court extended to the position before as well as after notification.
16. At [35]-[38] of his judgment, the judge noted *inter alia* that it was virtually impossible for Google Inc to exercise editorial control over the content of the blogs it hosts, which in the aggregate contain more than half a trillion words, with 250,000 new words added every minute. He referred to the submission that it would be unrealistic to attribute responsibility for publication of material on any particular blog to Google Inc, whether before or after notification of a complaint. He also referred to the importance of striving to achieve consistency in decisions in the face of rapidly developing technology, and to paying proper regard to the values enshrined in the ECHR. He said that the fact that an entity in Google Inc’s position had been notified of a complaint did not immediately convert its status or role into that of a publisher. If Google Inc’s status before notification of a complaint was that of a provider or a facilitator, it was not easy to see why that role should be expanded thereafter into that of a person who authorised or acquiesced in publication. Google Inc claimed to

remain as neutral in the process after notification as it was before. It might be true that it had the technical capability of taking down blogs or comments on its platform, yet that was not by any means the same as saying that it had become an author or authoriser of the publication:

“It is no doubt often true that the owner of a wall which has been festooned, overnight, with defamatory graffiti could acquire scaffolding and have it all deleted with whitewash. That is not necessarily to say, however, that the unfortunate owner must, unless and until this has been accomplished, be classified as a publisher.”

17. The judge went on at [39] to attach significance to the evidence that Google Inc was not required to take any positive step, technically, in the process of continuing the accessibility of the offending material: he said that its role as a platform provider was “a purely passive one”. The situation was thus in his view closely analogous to that described in *Bunt v Tilley* [2007] 1 WLR 1243, and in striving to achieve consistency in the court’s decision-making he would rule that Google Inc was not liable at common law as a publisher.
18. *Bunt v Tilley* concerned internet service providers (ISPs) who were not alleged to have *hosted* any website relevant to the claims. The issue was whether they could be liable simply in respect of defamatory material communicated via the services they provided. Eady J was again the judge. In a central passage of his judgment he said this:

“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* [emphasis in the original]. 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.)”

19. At [36] he held that an ISP which performs no more than a passive role in facilitating postings on the internet cannot be deemed to be a publisher at common law. A telephone company or other passive medium of communication, such as an ISP, is not analogous to someone in the position of a distributor, who might at common law be treated as having published so as to need a defence.
20. In *Metropolitan International Schools Ltd v Designtecnica Corpn* [2011] 1 WLR 1743 Eady J applied a similar analysis in relation to defamatory comments which, having been posted on a website, appeared as a “snippet” of information when an internet search was carried out under the claimant’s name on Google Inc’s search engine. The judge said that for a person to be fixed at common law with responsibility for publishing defamatory words, there needed to be a mental element, as summarised in *Bunt v Tilley*. He held that the search in issue was performed automatically and involved no input from Google Inc, which had not authorised or caused the snippet to appear on the user’s screen in any meaningful sense but had merely by the provision of its search service played the role of a facilitator. As to the position once Google Inc had been informed of the defamatory content of the snippet, the judge said that a person can be liable for the publication of libel by acquiescence, that is to say by permitting publication to continue when he or she has the power to prevent it. He drew a distinction between a search engine and someone hosting a website, pointing to the greater difficulty of ensuring that offending words do not appear on a search snippet. Google Inc’s “take-down” procedure might not have operated as rapidly as the claimant would wish, but it did not follow as a matter of law that between notification and take-down Google Inc became liable as a publisher of the offending material. While efforts were being made to achieve a take-down in relation to a particular URL it was hardly possible to fix Google Inc with liability on the basis of authorisation, approval or acquiescence. On the facts of the case, he believed it unrealistic to attribute responsibility for publication to Google Inc.
21. At the forefront of the appellant’s submissions to this court was an elaborate attack on *Bunt v Tilley* as applied in *Metropolitan International Schools Ltd* and the present case. Mr Busuttill submitted that the reasoning in *Bunt v Tilley* erroneously conflated a number of different threads of law. What Eady J said about the need for “knowing involvement in the process of publication of *the relevant words*” is at odds with the principle of strict liability for publication, irrespective of knowledge of the defamatory words. Further, in certain circumstances a person may be or become

involved in publishing defamatory material by omission, by failing or forbearing to take a step that ought to have been taken, or by remaining passive. The judge's reasoning does not accurately reflect the distinction between a *primary* publisher and a *secondary* publisher (for whom alone the common law defence of innocent dissemination is available). Nor does the reasoning take proper account of the principles of vicarious liability or agency as they apply to render corporations liable for the publication of defamatory material by employees or agents. Mr Busuttil drew our attention to numerous domestic and Commonwealth authorities, submitting in particular that the courts in Australia have not accepted the *Bunt v Tilley* analysis (see e.g. *Trkulja v Google Inc (No.5)* [2012] VSC 533, a decision of the Supreme Court of Victoria), although the analysis has been followed by the Canadian Supreme Court (see *Crookes v Newton* [2011] 3 SCR 269).

22. Mr Busuttil submitted that Google Inc is a corporation in the business of publishing, acting not just through its employees but also through the myriad of bloggers and all those who post comments on the blogs. It has control over the blogger, who in turn has control over the comments posted on the blog. Google Inc is therefore to be regarded as a primary publisher, potentially liable for defamatory material on the blogs, irrespective of knowledge or fault and irrespective of whether it has been notified of any complaint, subject however to any statutory defences. Alternatively it is a secondary publisher, facilitating publication in a manner analogous to a distributor, subject to the common law defence of innocent dissemination as well as to statutory defences, though it will be difficult to establish the defence of innocent dissemination if it has the power to prevent continuing publication and chooses not to exercise that power.
23. I do not find it necessary to address the full detail of Mr Busuttil's criticisms of *Bunt v Tilley*. I am not persuaded that Eady J fell into any fundamental error of analysis or reached the wrong conclusion in relation to the kind of internet service under consideration in that case. For the reasons set out below, however, I respectfully differ from Eady J's view that the present case is so closely analogous to *Bunt v Tilley* as to call for the same conclusion. In my view the judge was wrong to regard Google Inc's role in respect of Blogger blogs as a purely passive one and to attach the significance he did to the absence of any positive steps by Google Inc in relation to continued publication of the comments in issue.
24. By the Blogger service Google Inc provides a platform for blogs, together with design tools and, if required, a URL; it also provides a related service to enable the display of remunerative advertisements on a blog. It makes the Blogger service available on terms of its own choice and it can readily remove or block access to any blog that does not comply with those terms (a point of distinction with the search engine under consideration in *Metropolitan International Schools Ltd*, as the judge himself noted in that case). As a matter of corporate policy and no doubt also for reasons of practicality, it does not seek to exercise prior control over the content of blogs or comments posted on them, but it defines the limits of permitted content and it has the power and capability to remove or block access to offending material to which its attention is drawn.
25. By the provision of that service Google Inc plainly facilitates publication of the blogs (including the comments posted on them). Its involvement is not such, however, as to make it a primary publisher of the blogs. It does not create the blogs or have any

prior knowledge of, or effective control over, their content. It is not in a position comparable to that of the author or editor of a defamatory article. Nor is it in a position comparable to that of the corporate proprietor of a newspaper in which a defamatory article is printed. Such a corporation may be liable as a primary publisher by reason of the involvement of its employees or agents in the publication. But there is no relationship of employment or agency between Google Inc and the bloggers or those posting comments on the blogs: such people are plainly independent of Google Inc and do not act in any sense on its behalf or in its name. The appellant's reliance on principles of vicarious liability or agency in this context is misplaced.

26. I am also very doubtful about the argument that Google Inc's role is that of a secondary publisher, facilitating publication in a manner analogous to a distributor. In any event it seems to me that such an argument can get nowhere in relation to the period prior to notification of the complaint. There is a long established line of authority that a person involved only in dissemination is not to be treated as a publisher unless he knew or ought by the exercise of reasonable care to have known that the publication was likely to be defamatory: *Emmens v Pottle* (1885) 16 QBD 354, 357-358; *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170, 177-180; *Bottomley v FW Woolworth and Co Ltd* (1932) 48 TLR 521. There are differences in the reasoning in support of that conclusion but the conclusion itself is clear enough. The principle operated in *Bottomley* to absolve Woolworth from liability for publication of a defamatory article in a consignment of remaindered American magazines that it distributed: the company did not check every magazine for defamatory content, there was nothing in the nature of the individual magazine which should have led it to suppose that the magazine contained a libel, and it had not been negligent in failing to carry out a periodical examination of specimen magazines. Since it cannot be said that Google Inc either knew or ought reasonably to have known of the defamatory comments prior to notification of the appellant's complaint, that line of authority tells against viewing Google Inc as a secondary publisher prior to such notification. Moreover, even if it were to be so regarded, it would have an unassailable defence during that period under section 1 of the 1996 Act, considered below.
27. In relation to the position *after* notification of the complaint, however, additional considerations arise, and it is in relation to this period that I take a different view from that of Eady J on the issue of publication. I am led to do so primarily by the decision of the Court of Appeal in *Byrne v Deane* [1937] 1 KB 818. That case concerned an allegedly defamatory verse which someone had posted on the wall of a golf club and which was then allowed to remain there for some days. The defendants, who had not been involved in the initial publication, were the proprietors of the golf club, and one of them was also the club secretary. One of the rules of the club provided that "no notice or placard shall be posted in the club premises without the consent of the secretary". The court held by a majority that the words of the verse were not capable of a defamatory meaning, but all three members of the court agreed that there was evidence of publication by one or both of the defendants. Greer LJ expressed the point in this way (at page 830):

"In my judgment the two proprietors of this establishment by allowing the defamatory statement, if it be defamatory, to rest upon their wall and not to remove it, with the knowledge that

they must have had that by not removing it it would be read by people to whom it would convey such meaning as it had, were taking part in the publication of it.”

28. Slessor LJ considered there to be evidence of publication by the secretary but not by the other defendant. In relation to the secretary he said this (at pages 834-835):

“There are cases which go to show that persons who themselves take no overt part in the publication of defamatory matter may nevertheless so adopt and promote the reading of the defamatory matter as to constitute themselves liable for the publication

... She said ‘I read it. It seemed to me somebody was rather annoyed with somebody.’ I think having read it, and having dominion over the walls of the club as far as the posting of notices was concerned, it could properly be said that there was some evidence that she did promote and associate herself with the continuance of the publication.”

29. Greene LJ agreed with Greer LJ that there was evidence of publication by both defendants. His reasons included the following (at pages 837-838):

“It is said that as a general proposition where the act of the person alleged to have published a libel has not been any positive act, but has merely been the refraining from doing some act, he cannot be guilty of publication. I am quite unable to accept any such general proposition. It may very well be that in some circumstances a person, by refraining from removing or obliterating the defamatory matter, is not committing any publication at all. In other circumstances he may be doing so. The test it appears to me is this: having regard to all the facts of the case is the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put?”

30. *Byrne v Deane* was considered in *Godfrey v Demon Internet Ltd* [2001] QB 201, in which the defendant ISP received and stored on its news server a defamatory article which had been posted by an unknown person using another ISP. The plaintiff notified the defendant of the article and asked it to remove the article, but the defendant failed to do so and the posting remained on the news server for ten days until it expired automatically. The plaintiff claimed against the defendant in respect of that period of ten days. Morland J held that the defendant was liable. Whilst he cited the passage from Greene LJ’s judgment in *Byrne v Deane* quoted above, he rested his decision on the broader ground that whenever there was a transmission of a defamatory posting from the storage of the defendant’s news server, the defendant was a publisher of that posting but had a defence under section 1 of the 1996 Act until it lost that defence as a result of the plaintiff’s notification.

31. More directly in point is *Davison v Habeeb and Others* [2011] EWHC 3031 (QB), which concerned defamatory material posted on a blog hosted by Google Inc itself. HHJ Parkes QC, sitting as a deputy judge of the High Court, considered it arguable that Google Inc was a publisher from the outset, subject to the defence under section 1 of the 1996 Act, but he also relied on *Byrne v Deane* as an alternative strand in the reasoning that led him to conclude that there was an arguable case against Google Inc:

“38. ... The analogy between the ISPs which Eady J was considering in *Bunt v Tilley* ... and the postal service was an apt one, because the ISPs in that case, like the postal or indeed the telephone services, were simply conduits, or facilitators, enabling messages to be carried from one person, or one computer, to another. Blogger.com, by contrast, is not simply a facilitator, or at least not in the same way as the ISPs. It might be seen as analogous to a gigantic noticeboard which is in [Google Inc’s] control, in the sense that [Google Inc] provides the noticeboard for users to post their notices on, and it can take the notices down (like the club secretary in *Byrne v Deane* ...) if they are pointed out to it. However, pending notification it cannot possibly have the slightest familiarity with the notices posted, because the noticeboard contains such a vast and constantly growing volume of material. On that analogy, it ought not to be viewed as a publisher until (at the earliest) it has been notified that it is carrying defamatory material so that, by not taking it down, it can fairly be taken to have consented to and participated in publication by the primary publisher. The alternative is to say that, like Demon Internet in *Godfrey v Demon Internet Ltd...*, it chose to host material which turned out to be defamatory, and which it was open to anyone to download, so that at common law it was prima facie liable for publication of the material, subject to proof that it lacked the necessary mental state.

...

42. ... In my view it must be at least arguable that [Google Inc] should properly be seen as a publisher responding to requests for downloads like Demon Internet, rather than a mere facilitator, playing a passive instrumental role.

...

47. Even if [Google Inc] should properly be seen as a facilitator, the mere provider of a gigantic noticeboard on which others published defamatory material, in my judgment it must also at least be arguable that at some point after notification [Google Inc] became liable for continued publication of the material complained of on the *Byrne v Deane* principle of consent or acquiescence.”

32. The principles in *Byrne v Deane* have also been applied in the context of website or search engine content in a number of Commonwealth cases to which Mr Busuttill drew our attention: see, in particular, *Sadiq v Baycorp (NZ) Limited* [2008] NZHC 403 and *A v Google New Zealand Ltd* [2012] NZHC 2352.
33. In the present case, Eady J referred at [32]-[33] to *Godfrey v Demon Internet Ltd* and to *Davison v Habeeb*, observing that the position may well be fact sensitive: liability may turn upon the extent to which the relevant ISP has knowledge of the words complained of, and of their illegality or potential illegality, and/or on the extent to which it has control over publication. In relation to Blogger he said nothing about HHJ Parkes QC's analogy with the provision of a gigantic notice board on which others post comments. Instead, he drew an analogy with ownership of a wall on which various people choose to inscribe graffiti, for which the owner is not responsible (see [16] above). I have to say that I find the notice board analogy far more apposite and useful than the graffiti analogy. The provision of a platform for the blogs is equivalent to the provision of a notice board; and Google Inc goes further than this by providing tools to help a blogger design the layout of his part of the notice board and by providing a service that enables a blogger to display advertisements alongside the notices on his part of the notice board. Most importantly, it makes the notice board available to bloggers on terms of its own choice and it can readily remove or block access to any notice that does not comply with those terms.
34. Those features bring the case in my view within the scope of the reasoning in *Byrne v Deane*. Thus, if Google Inc allows defamatory material to remain on a Blogger blog after it has been notified of the presence of that material, it might be inferred to have associated itself with, or to have made itself responsible for, the continued presence of that material on the blog and thereby to have become a publisher of the material. Mr White QC submitted that the vast difference in scale between the Blogger set-up and the small club-room in *Byrne v Deane* makes such an inference unrealistic and that nobody would view a comment on a blog as something with which Google Inc had associated itself or for which it had made itself responsible by taking no action to remove it after notification of a complaint. Those are certainly matters for argument but they are not decisive in Google Inc's favour at this stage of proceedings, where we are concerned only with whether the appellant has an arguable case against it as a publisher of the comments in issue.
35. I do not consider that such an inference could properly be drawn until Google Inc had had a reasonable time within which to act to remove the defamatory comments. It will be recalled that on the judge's findings the letter of claim containing the complaint about Comment A was received on or about 5 July 2011 (and certainly by 8 July), the complaint about Comment B was introduced in the appellant's response to Google Inc on 8 July, and the complaint about Comment D was introduced on 22 July. The letter of claim was forwarded to the blogger on 11 August and the material was all removed on 14 August. That means that in relation to Comments A and B, in particular, a period of over five weeks elapsed between notification and removal. In the context of the defence under section 1 of the 1996 Act, considered below, Eady J described Google Inc's response as somewhat dilatory but not outside the bounds of a reasonable response. Whilst I accept the judge's assessment in the context of the statutory defence, it is in my view open to argument that the time taken was

sufficiently long to leave room for an inference adverse to Google Inc on *Byrne v Deane* principles.

36. The period during which Google Inc might fall to be treated on that basis as a publisher of the defamatory comments would be a very short one, but it means that the claim cannot in my view be dismissed on the ground that Google Inc was clearly not a publisher of the comments at all.

The defence under section 1 of the 1996 Act

37. I therefore turn to consider the defence under section 1 of the 1996 Act. That section provides:

“(1) 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.

(2) For this purpose ‘author’, ‘editor’ and ‘publisher’ have the following meanings, which are further explained in subsection (3) –

‘author’ means the originator of the statement, but does not include a person who did not intend that his statement be published at all;

‘editor’ means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and

‘publisher’ means 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.

(3) A person shall not be considered the author, editor or publisher of a statement if he is only involved –

- (a) in printing, producing, distributing or selling printed material containing the statement;
- (b) in processing, making copies of, distributing, exhibiting or selling a film or sound recording (as

defined in Part I of the Copyright, Designs and Patents Act 1988) containing the statement;

- (c) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;
- (d) as the broadcaster of a live programme containing the statement in circumstances in which he has no effective control over the maker of the statement;
- (e) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.

In a case not within paragraphs (a) to (e) the court may have regard to those provisions by way of analogy in deciding whether a person is to be considered the author, editor or publisher of a statement.

(4) Employees or agents of an author, editor or publisher are in the same position as the employer or principal to the extent that they are responsible for the content of the statement or the decision to publish it.

(5) In determining for the purposes of this section whether a person took reasonable care, or had reason to believe that what he did caused or contributed to the publication of a defamatory statement, regard shall be had to –

- (a) the extent of his responsibility for the content of the statement or the decision to publish it,
- (b) the nature or circumstances of the publication, and
- (c) the previous conduct or character of the author, editor or publisher.”

38. It will be seen that the conditions in subsection (1) are cumulative. Eady J held at [42]-[51] that all three conditions were satisfied in this case.

39. As to subsection (1)(a), he held that Google Inc was not a “publisher” for these purposes even if, contrary to his primary conclusion, it was to be treated at common law as having been a publisher of the defamatory comments. It did not come within the definition of “commercial publisher” within subsection (2) since in operating the Blogger service it did not itself issue material to the public or a section of the public and, specifically, it did not issue material containing the statements complained of. Eady J also drew support from subsection (3)(e), taking the view that Google Inc

could accurately be characterised as providing access to a communications system by means of which the statements were transmitted or made available by a person over whom it had no effective control: by “effective control” it was likely that the draftsman had in mind effective day-to-day control rather than the possibility of intervention in reliance on a contractual term about the permitted content of a web page.

40. I see no reason to disagree with the judge’s conclusion on that point. In particular, I do not think that Google Inc can sensibly be said to have “issued” the defamatory comments even if it was involved in their publication in a way capable of attracting liability at common law. Its involvement was of a kind analogous to, if not identical to, that described in subsection (3)(e). I share the judge’s view that the existence of a contractual term about the content of blogs is not sufficient to give it “effective control” over the person who posted the defamatory comments.
41. As to the conditions in subsection (1)(b) and (c), in my judgment they are plainly satisfied in relation to the period prior to notification of the complaint. There is no basis for concluding in relation to that period that Google Inc failed to take reasonable care in relation to publication of the comments or that it knew or had reason to believe that it caused or contributed to their publication. Greater difficulty arises, however, in relation to the application of the conditions to continued publication of the comments after Google Inc had notice of their allegedly defamatory content.
42. Thus, the relevant question in relation to subsection (1)(b) is whether Google Inc took reasonable care in relation to the continued publication of the comments. Eady J referred to the submissions of counsel for Google Inc that the company took reasonable care in relation to the appellant’s complaint when it passed the complaint on to the blogger and that this was a proportionate response. The judge held at [47]:

“One could certainly say that the response was somewhat dilatory, but I would not consider it, in all the circumstances of this case, to be outside the bounds of a reasonable response”.
43. This may have been a generous view but I am not persuaded that it was wrong. The factors in subsection (5), to which regard must be had in determining whether Google Inc took reasonable care, tell in its favour: the company had no responsibility for the content of the comments or the decision to publish them; the circumstances of publication include the vast number of blogs that are hosted on Blogger, which may be said to justify a longer response time; and there is no evidence of anything in the previous conduct of the particular blogger or of those who posted the comments that might have called for speedier action to be taken. The situation is distinguishable from that which caused Morland J to hold in *Godfrey v Demon Internet* that subsection (1)(b) posed an insuperable difficulty for the defendants since “after receipt of the plaintiff’s fax, the defendants knew of the defamatory posting but chose not to remove it from their ... news servers”: it is clear why, in the absence of any steps at all, the judge in that case did not think that reasonable care had been exercised.
44. The relevant question in relation to subsection (1)(c) is whether it can be said that in the period after notification of the complaint Google Inc did not know, and had no reason to believe, that what it did caused or contributed to the publication of a

defamatory statement. The judge's reasoning on this was very brief. He said at [49] that once the complaint in respect of a relevant comment was notified, Google Inc would have had reason to believe that the comment was defamatory, but that this was "far from saying ... that Google Inc would have known, or had reason to believe, that it had done anything to cause or contribute to the publication of any of these statements". But the very considerations that lead me to conclude that Google Inc arguably became a publisher of the defamatory comments on *Byrne v Deane* principles also tend towards the conclusion that following notification it knew or had reason to believe that what it did caused or contributed to the continued publication of the comments. The judge in *Davison v Habeeb and Others*, at [46], thought it arguable in that case that at some point after notification Google Inc knew or had reason to believe that its continued hosting of the material in question caused or contributed to the publication of a defamatory statement. In my view the same can be said in the present case.

45. Mr White QC submitted that Eady J appeared to have had in mind what was said in *Milne v Express Newspapers* [2005] 1 WLR 772 about the similar language in section 4(3) of the 1996 Act, to the effect that an offer to make amends under section 2 is a defence unless the person by whom the offer was made "knew or had reason to believe" that the statement complained of (a) referred to the aggrieved party or was likely to be understood as referring to him, and (b) was false and defamatory of that party. The court held in that case that a person knew or had reason to believe that a statement was false if he either knew that it was false or was reckless as to whether it was false, in the sense of not considering or caring whether it was true or not. Eady J made reference to that decision when finding in *Bunt v Tilley*, at [61], that the condition in subsection (1)(c) was satisfied in relation to one of the ISPs because the email sent to it by the complainant "did not effectively put [it] on notice, and its staff were given no reason to believe that they were causing or contributing to the publication of the postings complained of". That finding turned, however, on the particular terms of the email in question, and it is difficult to read into the judge's reasoning in the present case any implied reference either to what he said on this point in *Bunt v Tilley* or to the decision or reasoning in *Milne v Express Newspapers*. In any event this line of reasoning does not appear to me to provide a satisfactory answer to the concern I have expressed about the judge's view of subsection (1)(c) in the present case.
46. In the light of that concern about subsection (1)(c) I am not satisfied that, if Google Inc were found to be a publisher of the defamatory comments on *Byrne v Deane* principles, section 1 of the 1996 Act would provide it with an unassailable defence.
47. For that reason it is necessary to move to the next issue considered by the judge, namely the question whether any potential liability on the part of Google Inc was sufficient to justify the maintenance of the proceedings against it. The judge appeared to treat this as a subsidiary point under his consideration of the statutory defence, but it is in truth a distinct issue which assumes real importance in this case if I am correct in the conclusions I have reached so far.

"Real and substantial tort"

48. At [50] of his judgment, Eady J accepted an argument by counsel for Google Inc that the period between notification of the complaint and removal of the offending blog

was so short as to give rise to any potential liability on the part of Google Inc only for a very limited period, such that the court should regard it as so trivial as not to justify the maintenance of the proceedings. The judge said that, to adopt the words in *Jameel (Yousef) v Dow Jones & Co Inc* (cited above), “the game would not be worth the candle”.

49. In *Jameel (Yousef)* the Court of Appeal upheld an application to strike out as an abuse of process defamation proceedings against the publisher of a US newspaper in respect of an article posted on an internet website in the USA which was available to subscribers in England but had been the subject of minimal publication within this jurisdiction. The court considered that the principles relevant to a strike-out application overlapped with those relevant to an application to set aside permission to serve out of the jurisdiction. It was in the latter context that the question whether “a real and substantial tort has been committed within the jurisdiction” had been developed, but the court considered that the question whether a substantial tort had been committed in the jurisdiction was also relevant to an application to strike out as abuse of process. It held that keeping a proper balance between the article 10 right of freedom of expression and the protection of individual reputation required the court to bring to a stop, as an abuse of process, defamation proceedings that were not serving the legitimate purpose of protecting the claimant’s reputation, which included compensating the claimant only if that reputation had been unlawfully damaged. The court went on to consider whether, on the facts of the case before it, vindication of the claimant’s reputation justified the continuance of the action. It concluded:

“69. If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The costs of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick.

70. If we were considering an application to set aside permission to serve these proceedings out of the jurisdiction we would allow that application on the basis that the five publications that had taken place in this jurisdiction did not, individually or collectively, amount to a real and substantial tort. Jurisdiction is no longer in issue, but subject to the effect of the claim for an injunction that we have yet to consider, we consider for precisely the same reason that it would not be right to permit this action to proceed. It would be an abuse of the process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake”

50. In my judgment, Eady J was plainly right to conclude that the application in the present case to set aside permission to serve out of the jurisdiction should be allowed for like reasons. The allegedly defamatory comments were posted between 28 and 30 April, soon after the initial blog of 27 April. By the very nature of a blog, they will have been followed by numerous other comments in the chain and, whilst still

accessible, will have receded into history. As I have indicated, the earliest point at which Google Inc could have become liable in respect of the comments would be some time after notification of the complaint in respect of them. But it is highly improbable that any significant number of readers will have accessed the comments after that time and prior to removal of the entire blog. It follows, as the judge clearly had in mind, that any damage to the appellant's reputation arising out of continued publication of the comments during that period will have been trivial; and in those circumstances the judge was right to consider that "the game would not be worth the candle". I do not accept Mr Busuttill's submission that various other features of the claim, including the fact that the appellant's name is relatively uncommon and distinctive in this jurisdiction, undermined the judge's conclusion.

51. It follows that, despite the fact that I have reached certain conclusions favourable to the appellant on the previous issues, this appeal must in my view fail.
52. In those circumstances, although the issue was the subject of detailed argument before us, it is unnecessary to consider whether Google Inc would have a defence under regulation 19 of the 2002 Regulations.

Lord Justice Sullivan :

53. I agree.

Master of the Rolls :

54. I also agree.