



Neutral Citation Number: [2006] EWHC 407 (QB)

Case No: 5EX90059

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 10/03/2006

**Before :**

**THE HON. MR JUSTICE EADY**

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**Between :**

**John Bunt**

**Claimant**

**- and -**

- 1. David Tilley**
- 2. Paul Hancox**
- 3. Christopher Stevens**
- 4. AOL UK Ltd**
- 5. Tiscali UK Ltd**
- 6. British Telecommunications plc**

**Defendants**

**The Claimant appeared in person**

**Jane Phillips** (instructed by Kirkpatrick & Lockhart Nicholson Graham LLP) for the **fourth Defendant**

**Jonathan Barnes** (instructed by Lawrence Stephens) for the **fifth Defendant**

**Sapna Jethani** (instructed by Catherine Lloyd) for the **sixth Defendant**

Hearing date: 16th February 2006

**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 HON. MR JUSTICE EADY

**The Hon. Mr Justice Eady :**

1. Mr John Bunt, the Claimant, seeks remedies in these proceedings against six defendants. The first three are individuals, Mr David Tilley, Mr Paul Hancox, and Mr Christopher Stevens. They take no part in the applications now before me. The Claimant complains of statements hosted on websites, the responsibility for which he attributes to one or other of the first three Defendants. What is controversial, however, is that he also seeks remedies against their respective internet service providers (“ISPs”). The fourth to sixth Defendants are, respectively, the ISPs of the first to third Defendants.
2. The ISP Defendants all now apply, on grounds which overlap to a large extent, for orders that the claims against them be struck out or dismissed on a summary basis. The fourth Defendant (“AOL”) and the sixth Defendant (“BT”) apply both under CPR 3.4(2) and CPR 24.2. The fifth Defendant (“Tiscali”) has confined itself to reliance on CPR 3.4(2).
3. The matter came before Gray J on 2 December 2005, when the Claimant was given an opportunity to identify the nature of his claim more clearly. The case was accordingly reformulated in amended particulars of claim dated 8 December 2005.
4. It is notable that the Claimant takes the stance that the words complained of in this litigation form only a small part of the totality of defamatory allegations published about him through the internet. He regards it as an on-going problem. He claims that “... it is a precursor to a pandemic scale infection that is already widespread and festering just below the surface”. Nevertheless, he has to recognise that there is no mechanism in this kind of litigation for proceeding on the basis of “sample” publications. If a claimant wishes to sue over defamatory allegations, and to recover compensation and other remedies in respect of them, they must be set out clearly in the particulars of claim.
5. It is important in the context of the present applications that it is not pleaded that any of the three corporate Defendants has at any stage “hosted” any website relevant to these claims. The basis upon which the Claimant seeks to establish his causes of action is that the individual Defendants published the offending words “via the services provided” by their ISPs. The claim therefore raises points of general significance as to the basis upon which a provider of such services could, if at all, be liable in respect of material which is simply communicated via the services which they provide.
6. The Claimant submits as follows:

“This is not some tuppenny ha’penny storm in a teacup, this is a truly vast case, the like of which English Defamation Law has never before seen, because of both the scope and nature, as well as the medium. It positively screams out for a Trial, and one way or another it will have one.”
7. It is necessary to consider the evidence relied on by the parties dealing with the role of ISPs in general and, more specifically, the interrelationship between the two sets of Defendants in these proceedings. Evidence is admissible for the purposes of an

application for summary judgment under CPR Part 24, although in the context of CPR Part 3 the court is concerned with the pleaded case which is the subject of challenge. Thus, the primary question on such an application would be whether or not any facts pleaded are capable of giving rise to liability on the part of an ISP for publication of material via its services. It is not, for example, pleaded against any of the corporate Defendants that it authorised any relevant publication or was vicariously responsible for it. Neither the pleaded case nor the evidence discloses any role on the part of these Defendants other than that of affording connection to the internet. On this basis, it is argued on behalf of all the corporate Defendants that the necessary ingredients for publication are missing.

8. The high point of the Claimant's case in this respect is to rely upon the fact that the corporate Defendants have provided a route as intermediaries, whereby third parties have access to the internet and have been able to pass an electronic communication from one computer to another resulting in a posting to the Usenet message board. The Usenet service is hosted by others, who are not parties to these proceedings, such as Google. It is not accepted that the relevant postings necessarily took place via the relevant ISP services, but that would be a matter for the Claimant to establish at trial. For the moment, that assumption should be made in his favour.
9. When considering the internet, it is so often necessary to resort to analogies which, in the nature of things, are unlikely to be complete. That is because the internet is a new phenomenon. Nevertheless, an analogy has been drawn in this case with the postal services. That is to say, ISPs do not participate in the process of publication as such, but merely act as facilitators in a similar way to the postal services. They provide a means of transmitting communications without in any way participating in that process.
10. My attention was drawn to certain passages in Dr Matthew Collins' work *The Law of Defamation and the Internet* (2<sup>nd</sup> edn, 2005) at paras. 15.38 and 15.43:

“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.

...

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 publications passing through their

computer systems, and therefore not responsible for publishing them”.

The line of authority to which Dr Collins was referring was exemplified in such cases as *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] 1 AC 1013, 1058 (breach of copyright); *PLG Research Limited and Ardon International Ltd* [1993] FSR 197, 238-9 (infringement of patent); *MCA Records Inc v Charly Records Ltd* [2002] EMLR 1 (infringement of copyright and trademark); *Douglas v Hello! Ltd* [2003] EMLR 29 at [70] (breach of confidence: liability as a joint tortfeasor will only be imposed where the claimant proves ‘concerted action to a common end’). There is no instance so far in which that line of authority has been extended into the field of defamation although, as Dr Collins points out, in *MCA Records Inc v Charly Records Ltd* Chadwick LJ observed (at p27) that the line of authority applied “at least in the field of intellectual property” (emphasis added).

11. It is now necessary to consider the decision of Morland J in *Godfrey v Demon Internet Ltd* [2001] QB 201, upon which the Claimant relies. In that case, the Defendant was an ISP, which had received and stored a defamatory article on its news server which had been posted by an unknown person via another ISP. Mr Godfrey informed Demon of the defamatory nature of the article and requested its removal from their news server. It remained available, however, until its automatic expiry. In his statement of claim Mr Godfrey made it clear that he was confining his claim for damages to the period after January 1997, when the Defendant had knowledge that the posting was defamatory. The Defendant relied upon s.1(1) of the Defamation Act 1996, arguing that it was not the publisher of the statement in question; that it had taken reasonable care; and that it did not know, and had no reason to believe, that it had caused or contributed to the publication of a defamatory statement. Mr Godfrey applied to strike out that part of the defence as unsustainable.
12. Morland J granted the application, holding on the particular facts that the Defendant was not merely a passive owner of an electronic device through which postings were transmitted. It had actively chosen to receive and store the news group exchanges containing the posting, and it could be accessed by its subscribers. It was within its power to obliterate the posting, as indeed later happened. Once the Defendant knew of the defamatory content and took the decision not to remove it from its news server, it was no longer able to satisfy the requirements of s.1(1)(b) that reasonable care had been taken, or of s.1(1)(c) that it did not know, and it had no reason to believe, that what it did caused or contributed to the publication. The learned Judge considered a number of authorities and at p208H-209A concluded:

“In my judgment the defendants, whenever they transmit and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to their ISP who accesses the newsgroup containing that posting. Thus every time one of the defendants’ customers accesses soc.culture.thai and sees that posting defamatory of the plaintiff there is a publication to that customer”.
13. Reference was also made to certain cases from the United States, namely *Anderson v New York Telephone Co* (1974) 35 NY 2d 746 (“the telephone company’s role is merely passive ...”); *Cubby Inc v CompuServe Inc* (1991) 776 FS Supp 135 (“The

computer service company was a mere ‘distributor’ which could not be held liable ‘absent showing that it knew or had reason to know of defamation’); *Stratton Oakmont Inc v Prodigy Services Co* (1995) 23 Media L Rep 1794 (“Prodigy has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards ... Prodigy is a publisher rather than a distributor ...”); *Zeran v America Online Inc* (1997) 129 F 3d 327 (concerned with a statutory federal immunity); and *Lunney v Prodigy Services Co* (1998) 250 AD 2d 230. This latter case was perhaps closest in its background circumstances to the facts of *Godfrey v Demon Internet*. “Some infantile practical joker” sent an e-mail to a boy scout leader, which falsely gave the impression that it came from Alex G Lunney, “a prospective eagle scout”. He complained of that as well as two bulletin board messages posted with the help of Prodigy’s service.

14. Morland J made clear, however, that he found these of little assistance because of the fundamental differences in the approach to the law of defamation between the courts of England and those of the United States. What was left open for later consideration was how a court in England should approach a situation where, by contrast with the factual situation in Mr Godfrey’s case, an ISP had truly fulfilled no more than a passive role as owner of an electronic device through which defamatory postings were transmitted.
15. Publication is a question of fact, and it must depend on the circumstances of each case whether or not publication has taken place: see e.g. *Byrne v Deane* [1937] 1 KB 818, 837-838, *per* Greene LJ. The analogies that were held to be inappropriate in *Godfrey v Demon Internet* might yet be upheld where the facts do not disclose onward transmission with knowledge of the defamatory content. As Dr Collins observes, *op. cit.*, at para 15.43:

“Mere conduit intermediaries who carry particular Internet communications from one computer to another ... are analogous to postal services and telephone carriers in the sense that they facilitate communications, without playing any part in the creation or preparation of their content, and almost always without actual knowledge of the content”.

Such an approach would tend to suggest that at common law such intermediaries should not be regarded as responsible for publication. Indeed, that is consistent with the approach in *Lunney* where the New York Court of Appeals drew an analogy between an ISP and a telephone company “which one neither wants nor expects to superintend the content of his subscriber’s conversations”.

16. It is necessary, on the other hand, to bear in mind that Morland J in *Godfrey*, while acknowledging the factual similarity to the circumstances in the *Lunney* case, nonetheless took the view that it represented an approach to the law which was not consistent with English authority. It was held that Prodigy was not responsible in law for the e-mail or the defamatory bulletin board postings, one of the reasons being that “Prodigy did not publish the statement”. Morland J was of opinion that “at English common law Prodigy would clearly have been the publisher” of the message: see p212G.
17. Dr Collins tentatively concludes:

“In view of Morland J’s *obiter dictum* in *Godfrey v Demon Internet Ltd* and the authorities concerning postal services and telephone carriers discussed above, mere conduit Internet intermediaries are nonetheless probably publishers of the material which passes through their computer systems. Their liability in defamation law will depend on whether they can rely on a defence, the most important of which are the defences for intermediaries ...”.

In this context, he had in mind the provisions of s.1 of the Defamation Act 1996, the Electronic Commerce (EC Directive) Regulations 2002, the common law defence of innocent dissemination, and statutory defences applying in Australia.

18. Despite this cautious approach, I was invited by counsel in the present case to conclude that the corporate Defendants should not be regarded as responsible according to common law principles for the publication of the relevant postings, the factual situation before me being significantly different from that confronting Morland J.
19. My attention was also drawn to certain remarks made in the Court of Appeal in *Totalise plc v The Motley Fool* [2002] EMLR 358 at [28]-[29]. The appeal related only to questions of costs, and the issues which I have been outlining above were not specifically addressed. The case can only therefore be regarded as a “straw in the wind”. It is, nevertheless, of some interest that the ISP in that case was not penalised in costs (having adopted the policy that it would not reveal the name and address of one of its customers without a court order) since it was “an innocent party”. It was recognised that the position might have been different “... if they were in some way implicated or involved in the wrongful act”.
20. I prefer to avoid phrases with a moral connotation such as “innocent party” or “wrongful act”. The position may be complicated by arguments about whether or not the communication would be protected by qualified privilege or (say) fair comment. For example, one of the reasons why Prodigy succeeded in the *Lunney* case was that “... even if Prodigy could be considered a publisher of the statement, a qualified privilege protects it from any liability given the absence of proof that Prodigy knew such a statement could be false”. In such circumstances, it would be naturally inappropriate to use the phrase “wrongful act”. Language of this kind simply obscures the main issue.
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, Lord Esher MR.)
24. It is necessary in these circumstances for me to turn to the evidence in the present case in order to see whether the position is sufficiently clear for a determination to be made at the pre-trial stage. It seems that it is a question of whether or not the facts are uncontroversial or unchallenged. A submission was made to me that public policy requires that an ISP who merely facilitates internet publications *should* not be held responsible as a “publisher”, and that it would be desirable for ISPs to be protected in the same way that statutory immunity has been provided for, in respect of all proceedings in tort, by the Postal Services Act 2000. I am concerned here not with questions of public policy so much as whether or not any of the relevant Defendants in this case could be said to have been liable for publication in accordance with established common law principles. Nonetheless, in seeking to determine that question, I should have regard to the European Convention on Human Rights and Fundamental Freedoms and relevant Strasbourg jurisprudence, especially that relating to Articles 8 and 10.
25. One of the factors I have to consider is whether knowledge has been notified to any of the corporate Defendants in such a way as to render the ISP in question responsible for publication from that moment onwards (even assuming “innocence” up to that point). This is a question which I shall have to consider in the context of some of the other defences raised, but it is plainly relevant also to this threshold argument on common law publication.
26. Distinct issues arise in the context of notification with regard to each of the corporate Defendants. So far as AOL is concerned, the Claimant relies upon notice having been given on 13 February 2005. I was told by Mr Philip Whall in his witness statement of 9 January 2006 that AOL had no record of receiving any notification: it was only made aware of the Claimant’s case in this respect on receipt of the amended particulars of claim. In that document reference was made to two e-mails, dated respectively 13 and 15 February 2005. The first purported to be from Dave Null, which apparently is a name used by the Claimant for internet purposes. It was headed “AOL customer details disclosure request” and continued:

“Hi Guys,

One of your (UK) customers has committed an act of libel against my business on our business forums, the url in question is <http://www.surfbaud.co.uk/forum/index.php> right at the forum page, and he started a thread entitled “Be warned about these cheap Batteries! Load of Crap!”

... Chances are the culprit is the scourge of uk.local newsgroups a Mr David Tilley, last known address 6 Lime Road, Tiverton, Devon, EX16 6JA.

I am emailing you in this instance in order to ask what procedures you need completed by myself before you are able to divulge this individual’s name and address to me, so that i can institute legal proceedings against them for libel under UK law as a matter of urgency”.

The later e-mail simply said:

“Hi Guys, over 24 hours passed and zero response from yourselves so escalating it somewhat, please don’t leave me with no option but to hardcopy this request and courier it to UK Board Members ...

cheers

John Bunt”

27. It thus appears that Mr Tilley, the first Defendant, may have posted some unwanted statements on the Claimant’s own website; it was thus within his power to remove them if he wished to do so. All he was requesting was the identity of the person who had made those comments. It is not admitted that this was ever received by AOL but, even if it was, there was nothing to indicate that thereafter AOL sanctioned any publication with knowledge.
28. The Claimant did not ask AOL to remove the posting or suggest in either of the e-mails that he believed AOL was responsible for the posting.
29. A further point is taken by Ms Phillips on AOL’s behalf, to the effect that the words were not on their face defamatory. At most, they could be interpreted as disparaging the product.
30. In so far as the Claimant seeks support in *Godfrey*, there are plainly significant distinctions. Morland J deprived the ISP in that case from protection under s.1 of the 1996 Act because it had continued publication of the same defamatory statements after Mr Godfrey’s letter had been received, asking for them to be removed from the Usenet news server. Here, by contrast, the Claimant is relying upon separate postings.



In these there is no reference to batteries, but rather to suggestions of fraud and “kiddie porn”. There are no pleaded facts to suggest any knowing participation by AOL in the publication of *these* words.

31. Ms Phillips accordingly submits that an ISP should not become liable as a publisher (especially for postings on a site which it does not host) simply because it has been previously told of wholly unrelated allegedly defamatory statements, not necessarily even by the same author. That is a powerful argument which is relevant, as I have said, both to the fundamental issue of publication at common law and to statutory defences which I shall have to consider later.
32. I turn to the position of Tiscali, the fifth Defendant. In paragraph 18 of its defence, which is verified by a statement of truth, it is pleaded that the fifth Defendant only became aware of the complaint when it was served with the claim form on 12 August 2005. On that day, it suspended the internet access of the second Defendant pending investigation and resolution of the complaint. There is thus nothing to suggest knowing participation on the part of Tiscali either.
33. So far as BT is concerned, it is submitted that it did not know, and had no reason to believe, that it did anything to cause or contribute to the publication of a defamatory statement. This was addressed in evidence by Ms Catherine Lloyd, an in house solicitor. It is submitted, however, that the issue can be determined without the necessity of a trial of any contested factual issues. It is only necessary to look at the Claimant’s case.
34. Mr Bunt relies upon an e-mail dated 1 May 2005, giving notice to BT of the publications of which he complains. The notice referred to a posting earlier that day which allegedly libelled his business by disparaging his products. That posting, however, does not correspond to any of the postings subsequently complained of in his claim against BT. These were posted respectively at 7.48 am on 1 May, 2.38 pm on 1 July and 9.00 am on 5 July 2005. So much emerges clearly from paragraph 5 of his amended particulars of claim. By contrast, the posting referred to in his e-mail of 1 May was timed at 1.06 am that day. Moreover, the subject-matter of the postings actually complained of in these proceedings differs from that referred to in his 1 May complaint. The Claimant describes BT’s case in this respect as “insane and beyond belief”, but he has not addressed these important points. He takes the view that the issue is concluded by the notification of 1 May and a court order made in August 2005 that BT identify its customer.
35. There is thus no sustainable case on the Claimant’s part to support the proposition that BT knowingly authorised, sanctioned or participated in any of the relevant publications. Despite written requests, it was only upon receipt of the amended particulars of claim that BT was made aware of the postings actually complained of.
36. In all the circumstances I am quite prepared to hold that there is no realistic prospect of the Claimant being able to establish that any of the corporate Defendants, in any meaningful sense, knowingly participated in the relevant publications. His own pleaded case is defective in this respect in any event. More generally, I am also prepared to hold as a matter of law 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. I would not accept the Claimant’s proposition that this issue “can only

be settled by a trial”, since it is a question of law which can be determined without resolving contested issues of fact.

37. I would not, in the absence of any binding authority, attribute liability at common law to a telephone company or other passive medium of communication, such as an ISP. It is not analogous to someone in the position of a distributor, who might at common law need to prove the absence of negligence: see *Gatley on Libel and Slander* (10<sup>th</sup> edn) at para. 6-18. There a defence is needed because the person is regarded as having “published”. By contrast, persons who truly fulfil no more than the role of a passive medium for communication cannot be characterised as publishers: thus they do not need a defence.
38. For the sake of completeness, it is now necessary to address the alternative arguments raised by the applicants. I turn first to the Electronic Commerce (EC Directive) Regulations 2002, which came into force in August of that year. They define the circumstances in which internet intermediaries should be held accountable for material which is hosted, cached, or carried by them but which they did not create. The protection which these regulations afford is not confined to the publication of defamatory material. They embrace other illegal material, such as child pornography or the infringement of intellectual property rights.
39. The Claimant asserts that these Defendants are not intermediary service providers. “Simple logic dictates that to be an INTERMEDIARY service provider one must be a service provider who is BOTH customer of an upstream service provider and supplier to a downstream service provider”. Yet it is not a question of logic but of definition. No such restrictive definition appears in the regulations. Nor would it accord with the declared policy underlying them.
40. The effect of the regulations is to implement within this jurisdiction the Directive on Electronic Commerce, issued on 8 June 2000: Directive 2000/31/EC of the European Parliament and Council. 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.
41. The relevant provisions apply to “information society services”. That is an important consideration in the present case, because the Claimant contends that these corporate Defendants are not able to avail themselves of such protection. I must therefore have regard to the definition in Regulation 2(1) which incorporates Article 2(a) of the Directive. This, in turn, incorporates the definition in Directive 98/34/EC. An “information society service” connotes:

“any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”.

It is observed by Dr Collins, *op cit*, at para. 17.03 that:

“Commercial Internet intermediaries, such as ISPs, bulletin board operators, and web hosting services will usually satisfy this definition”.

It is certainly the case of these applicants that they each satisfy those requirements.

42. The matter is considered in *Gatley on Libel and Slander* (10<sup>th</sup> edn.) at para. 6.27. Reference is there made to Recital 42 of the Directive, which provides that exemptions from liability established in the Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient. That activity is said to be of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of, nor control over, information which is transmitted or stored.
43. The learned editors summarise the position as follows:

“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”.
44. Other instances of suppliers of internet access which might fall outside the definition are suggested by Dr Collins (at para. 17.03). He gives examples such as public libraries, universities, and schools where access would not be provided for remuneration, or at a distance, or both. In *Gatley*, however, it is submitted that, in the case of a university or fee paying school, it would be arguable that this service was provided for remuneration (through fees), even though there would not necessarily be a separately identifiable charge for the service.
45. At all events, it is clear to me from the evidence that these Defendants do indeed fall within the relevant definition. Of course that is challenged by the Claimant, but the facts which lead to that conclusion are themselves uncontroversial. I am thus unable to accept his submission that “... the Directive in question most certainly does NOT apply to the business relationship that exists between the three corporate Defendants and the three individual Defendants”. I need to turn next to Regulations 17 and 18, upon which AOL and Tiscali both place reliance.
46. Regulation 17(1), which is concerned with the concept of “mere conduits” provides as follows:

“(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”.

47. It is further provided by Regulation 17(2) that acts of transmission and of provision of access, for the purposes of Regulation 17(1), would include the automatic, intermediate and transient storage of the information transmitted where it takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission. That again is a point raised by Mr Bunt in the present proceedings. He submits that the material, or some of it, is cached for too long a period for it to be characterised as “reasonably necessary”. It is appropriate for this to be judged in the light of the automatic system put in place and the objective it is intended to achieve. The evidence is set out in some detail below.

48. Regulation 18 is concerned with caching:

“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 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 provider –

- (i) does not modify the information;
- (ii) complies with conditions of access to the information;
- (iii) complies with any rules regarding the updating of the information, specified in a manner widely recognised and used by 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 that 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”

49. The commentary in Gatley at para. 6.28 is helpful:

“The protection is therefore aimed at transient messages, such as email or at more permanent material which simply passes through the defendant’s system for purposes of access and not at material which is stored by the defendant for significant periods. The knowledge of the defendant is irrelevant, so he is not liable (in contrast to s.1 of the Defamation Act 1996) for failing to take steps to prevent access to another site which he is aware carries defamatory material. However, the provision does not confer immunity against the grant of an injunction”.

The learned editors mention (in footnote 21) a possible qualification with regard to web-based e-mail, which is normally stored on the provider’s server until deleted by the customer. This qualification has been developed further by Dr Collins, *op cit*, at para.17.08:

“The position is likely to be different for intermediaries who operate web-based e-mail services, such as MSN Hotmail. Such services store e-mail messages sent to their subscribers on their servers on a more permanent basis, so that the messages can be viewed by subscribers from any computer, located anywhere in the world. Rather than being deleted automatically from the intermediary’s server upon initial transmission to a subscriber, e-mail messages on web-based e-mail services are usually deleted from the intermediary’s server only at the request of the subscriber. As messages sent to web-based email services are not stored only on an ‘intermediate’ or ‘transient’ basis, and are frequently stored for a period longer than is reasonably necessary for their transmission, regulation 17 is unlikely to apply. Intermediaries operating these services are probably ‘hosts’, rather than ‘mere conduits’, of messages received by subscribers”.

50. Dr Collins also addresses (at para. 17.09) the matter of bulletin board postings and web pages, and concludes that Regulation 17 will usually apply to internet intermediaries who operate computer systems through which particular bulletin board postings and web pages happen to pass en route from one computer to another. This is subject to the proviso that the intermediary does not store the constituent IP datagrams for any period longer than is reasonably necessary for the transmission. Dr Collins suggests that, in order to attract the protection of Regulation 17, an intermediary would need to configure its computer system to delete any copies of the relevant datagrams immediately after receiving an acknowledgment that they have been received by the intended recipient. Should the datagrams be stored for a longer period, the intermediary would be likely to be deemed to have “cached” or “hosted” them.
51. The purpose of Regulation 18 is to protect internet intermediaries 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. Many ISPs and other intermediaries regularly cache, or temporarily store, commonly accessed web pages on their computer systems, so that those pages will be more quickly accessible to their subscribers. This is described by the learned editors of Gatley (at para. 6.29) as a “sort of half way house between mere transmission and ‘hosting’”.

52. The process was explained in evidence before me by Mr Nigel Hearth the Director of Technical Operations for AOL. In his witness statement of 10 February 2006 the matter is described as follows:

“4. When explaining in this statement how the practice of caching works I refer particularly to the practices of AOL in this area, although the practice of caching, and the way this is done (as explained below), is in effect ubiquitous amongst internet service providers.

5. The ability to view web pages quickly is an attractive attribute for users of the internet. The enormous volume of requests for web pages generated by internet users has led to the development of technical solutions by network providers and internet service providers to enable more efficient transmission of that information across the internet.

6. Caching is one such solution. It is a technical process which enables internet providers, such as AOL, to speed up the delivery of web pages to internet users by making a temporary copy of a web page that is requested by a user. When a subsequent request is made for the same page, the user can be provided with that content from the local ‘cached’ copy made by the internet service provider, rather than having to go back to the original web site which is the source of that page. This process enables the more efficient onward transmission of web pages to internet users.

7. A web cache (including AOL’s) is not a copy of the internet – that is neither the purpose of a web cache, nor would it be commercially or technically feasible. In order for web caches not to have to expand in memory size indefinitely the actual content in a web cache is designed to be overwritten in accordance with automatic defined rules ensuring that (i) cached content is up to date and (ii) cached content which is not being searched for (or has been removed or altered) is overwritten.

8. For ease of reference, I shall use a specific example, that of the pages of Google Groups, located at <http://groups.google.co.uk/group/uk.local.london> (“**Google Groups London**”).

9. Google Groups London is provided by Google and the content forming that page is hosted by Google i.e. that content sits on computers controlled by Google. A popular site such as

google.co.uk may easily have more than several hundred thousand visitors per day. When a person using an AOL Member Account connected to the internet via the AOL UK Propriety Service (an “AOL User”) navigates to Google Groups London, a request is sent from that user’s personal computer, via AOL, to the Google computer hosting Google Groups London. The requested page is then sent back to the AOL User, via their AOL connection.

10. When Google computers receive high volumes of requests within short time periods, delivery of the relevant Google Groups London page may be affected and a queue may form for the relevant Google computers to become free to respond to an individual’s request. The Google computers may simply become too busy.

11. To help alleviate this problem, AOL in common with all major internet service providers, uses a so-called ‘web cache’ to make the onward transmission of information of content such as Google Groups London more efficient to users of AOL when they request such information.

12. AOL’s web cache consists of a computer system which sits between (in this case) Google’s computers, on which the Google Groups London page is stored, and the home computers of individuals wishing to view Google Groups London.

13. The AOL web cache in effect watches requests for web pages made by individuals and then saves copies of the responses from Google’s computers. If there is a subsequent request for the Google Groups London page from an AOL User then that request is fulfilled by delivery of the Google Groups London page from the AOL web cache, rather than via the original location on Google computers.

13.1 As the request for the Google Groups London page is delivered from the AOL web cache, rather than the Google servers, it takes less time for AOL to retrieve the images and text on the Google Groups London page and display it to the AOL User wishing to view it.

13.2 The mechanism of storage by the AOL web cache is completely automatic. Providers of web sites set automated ‘rules’ or conditions specifying; (1) whether a page may be cached; (2) if it may be cached, at what time that cached material should expire; and (3) whether the cache computers should revalidate with the original source web site as to whether a page sitting on AOL’s web cache has been updated or deleted. These rules are embedded in instructions which exist ‘behind’ web pages and the rules are applied by, and are readable by, web browser software in accordance with industry

standards. This ensures that users of the internet reach the most up to date versions of web pages available. By way of example, for frequently updated pages like the BBC's news home page (located at <http://news.bbc.co.uk>), the instructions behind that particular page will dictate that the page should not be cached. Each time that page is requested, those instructions state that it should be retrieved from the original source, not from a cached copy.

13.3 By contrast, the messages hosted by Google Groups London contain instructions that allow caching but require that a web cache should revalidate the content with the original source for each subsequent request. So, if a particular message is cached, before the cache displays that content to a subsequent user requesting that page, the cache will check with Google as to whether that page has subsequently been removed or deleted.

13.4 This entire process is entirely automatic and the only reason for it is to make the transmission of web pages more efficient. AOL does not modify the information contained on web pages in any way. AOL complies with any conditions embedded in such pages regarding access to the information (for example by preventing the caching of pages which contain instructions for them not to be cached) and does not interfere in any way with the lawful use of technology widely used by the industry to obtain data on the use of information (for example tracking how many times a source page has been accessed).

13.5 The storage of such material on AOL's web cache is temporary – permanent storage would be inherently contradictory to the purpose and aim of the AOL web cache, which is to enable more efficient transmission of information to internet users.

13.6 It is core to the function of AOL's web caches and similar caches used by other internet service providers that they do not modify the content of the information they transmit.

13.7 The material will appear in AOL's web cache once the AOL user has requested it if the instructions in the source page permit this. AOL's web cache can only hold a limited amount of information. It will subsequently be overwritten when either:

(a) no AOL users request the Google Groups London page within a specified period (AOL sets this period at 7 days). Thereafter the Google Groups London page will be labelled by AOL's web cache as ready for deletion from the cache (such pages are described as ('Expired')), and will be overwritten, as newer requests for other web pages trigger the storage of those



pages in AOL's web cache – this mechanism effectively 'recycles' AOL's web cache memory by overwriting; or

(b) the source material is altered after it is stored in the cache – to use my example, if Google altered the content on the Google Groups London page, or removed it entirely, then that content would be labelled for deletion as soon as another AOL User requested that page. Prior to displaying that page to the AOL User, the AOL cache would revalidate the page with Google (in accordance with the automatic rules), find that the source page had changed or been removed and therefore label the Google Groups London page in the AOL web cache as Expired, leading to the overwriting of that page in the manner described above.

(c) Where access to the pages has been disabled or where a court or an administrative authority has ordered the source to remove or disable the content, and they had done so. Those pages stored in AOL caches would not be further displayed to an end user and would eventually be overwritten as the web cache stored other 'fresh' web pages."

53. There is no expert challenge to that evidence, and I have no reason to doubt that it represents the true position. How then does the Claimant propose to overcome the protection claimed by the fourth and fifth Defendants under these regulations? As I have said, he relies on "simple logic". He does not rely on any expert report. I turn therefore to his case as clarified in the light of the order of Gray J.
54. It is necessary to consider paragraph 19 of the amended particulars of claim which advances a proposition to the effect that there is an obligation to "gatekeep" its conduit. The nub of this submission appears to be contained in sub-paragraphs (i) and (j):

"An ISP providing a leased line connection to a customer has an extremely good argument under both the Defamation Act 1996 and also the Electronic Commerce Directive 2002 that it is no more than a 'conduit', that it has no knowledge or control over what passes through that 'conduit', and that the entire responsibility for what does pass through that 'conduit' rests with the customer who has purchased it, as it is the customer and not the ISP who acts as a 'gatekeeper' for that 'conduit'.

An ISP providing a standard domestic consumer or SOHO Internet access package to a customer has no possible hope of successfully arguing that it is a mere 'conduit' and therefore immune from that Law, as all content originates from within their own network, instead of merely passing through it in 'Via' fashion from one network to another.

In these circumstances not only is the ISP most definitely acting as sole 'gatekeeper' between the source of the defamatory material and

the Internet, they also provide a bundle of other services ... each of which clearly falls foul of the other provisions of the Electronic Commerce Directive 2002 which, for example, only allows the minimum level of cacheing technically necessary for the underlying technology of message transmission to function”.

The notion of a “gatekeeper” appears to derive from the Claimant himself; it is nowhere to be found in the regulations.

55. Furthermore, I can see no realistic prospect of such an argument succeeding because it flies in the face of the fundamental policy underlying the regulations.
56. As is already clear, the regulations would not preclude the grant of an injunction in a proper case. It is concerned to restrict financial and penal sanctions. It is provided in Regulation 20(b) that nothing should affect the rights of a party to apply for relief to prevent or stop infringement of any rights. It is not accurate to describe this, as the Claimant does, as “guaranteeing” his right to apply for relief and his “right to a trial”. Here it is inconceivable that an injunction would be granted against Tiscali, if only for the reason that it has terminated its relationship with the second Defendant. In any event, looking at the matter more broadly, it is clear to me that the injunctive relief sought by the Claimant is wholly disproportionate to any conceivable legitimate advantage. He seems to be applying for an order preventing any supply of services to the relevant Defendant. That would be Draconian and pointless, since the individual Defendants would be able to obtain such services with great ease elsewhere.
57. It is argued by Ms Phillips on behalf of AOL that, even if the claim for an injunction were formulated along conventional lines to prevent the publication of the same or similar words defamatory of the Claimant, this would be unworkable and disproportionate. She points out that AOL does not host any material about which the Claimant complains: nor would it have the ability or power to amend or modify any Usenet content. That was confirmed in evidence by Mr Philip Whall, General Counsel to the fourth Defendant. (Although he has been described several times by the Claimant as “mendacious”, the bare assertion is not enough to give rise to the need for a trial.) The grant of such an injunction would be pointless in respect of a defendant who has no way of ensuring compliance with its terms.
58. I now turn to consider a further set of provisions upon which the Defendants place reliance. Parliament enacted a rather different form of protection in s.1 of the Defamation Act 1996. Dr Collins considers the relationship between Regulation 17 and the s.1 defence: *op. cit.*, para. 17.10. He points out that there may be circumstances in which the application of the s.1 defence and of Regulation 17 would lead to inconsistent outcomes. He also considers the relationship between Regulation 18 and the s.1 defence at para. 17.19. As he points out, there could well be occasions when an ISP would be protected under Regulation 18 from liability for damages following transmission of a page which had been temporarily stored for the purpose of more efficient access – and yet fail in respect of a s.1 defence if publication was made of the offending web page to subscribers after its existence had been brought to its attention.
59. The starting point is to consider the terms of s.1 itself:

“(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.

...”

60. In the amended particulars of claim, the Claimant suggests that AOL has fallen foul of s.1(1)(c) by virtue of the notification in February 2005, to which I have already referred in the context of whether AOL would be liable as a publisher at common law in any event.
61. I addressed the submissions of Ms Phillips at that stage, and they seem to me to be equally valid in the present context. The e-mail did not effectively put AOL 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. Thus, s.1 would provide a complete defence to any claim in respect of those postings, whether for damages or an injunction. It is perhaps worth having in mind what was said by the Court of Appeal as to the hurdle to be surmounted in establishing “reason to believe” in a different context, albeit in the same statute, in *Milne v Express Newspapers Ltd* [2005] 1 WLR 772.
62. Ms Jethani for BT makes similar points in reliance upon s.1. She submits further that BT should not be regarded as a “publisher” by reason of s.1(3)(c) and/or (e).
63. Moreover, she also argues that BT took “reasonable care”, having regard to the evidence from her witness relating to their contractual terms binding those who avail themselves of the BT Click (a pay-as-you-go internet service) and for the BT Broadband service. Clause 6.1 of the terms and conditions relating to the BT Click service provides that the customer must take all reasonable precautions to ensure that no one uses the service “... to send, knowingly receive, upload, download or use any material which is ... defamatory ... or in breach of ... any other rights”.
64. Clause 20 of the Broadband terms and conditions, similarly, provides that a customer should take reasonable steps to make sure that nobody uses the service “... (b) to send, receive, upload download, or use any material which is ... defamatory”.
65. By reason of s.1(5) of the statute, it is necessary, in determining whether persons took reasonable care, or had reason to believe that what they did caused or contributed to the publication of a defamatory statement, to have regard to certain specific matters. These include the extent of the person’s responsibility for the content of the statement or the decision to publish it, the nature or circumstances of the publication, and the previous conduct or character of the author, editor or publisher.
66. There is nothing about these factors which would, in my judgment, in any way undermine the ability of either AOL or BT to rely upon the provisions of s.1.
67. Ms Jethani anticipated a further argument from the Claimant to the effect that the e-mail of 1 May 2005 provided BT with “reason to believe” that further postings would be made by the same person using its services and, moreover, that it should have taken reasonable care to monitor the newsgroup for defamatory postings about the Claimant. There is, however, no evidence that BT was informed of where on its

servers the posting was located, of which newsgroup it was posted upon, or of the e-mail address of the person responsible. It would be wholly impractical for BT to monitor its servers for defamatory content about the Claimant in any event.

68. It was made clear in the evidence served on behalf of BT that, although Regulations 17 and 18 had originally been relied upon, this was no longer being pursued. It is accepted that BT hosts Usenet newsgroups on its servers and that newsgroup postings are stored for a period of time, usually amounting to a few weeks, to enable BT's users to access them. BT does not operate the newsgroups, but it has the ability to remove postings from its newsgroup server, although they may still be viewed via other servers. In these circumstances it is necessary to consider the terms of Regulations 19 and 22.

69. In so far as it is relevant, the terms of Regulation 19 are as follows:

“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.”

70. The terms of Regulation 22 are, so far as relevant, as follows:

“In determining whether a service provider has actual knowledge for the purposes of regulations 18(b)(v) and 19(a)(i), a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, among other things, shall have regard to -

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

(b) the extent to which any notice includes -

(i) the full name and address of the sender of the notice;

- (ii) details of the location of the information in question; and
- (iii) details of the unlawful nature of the activity or information in question”.

71. Attention was also drawn in this context to the terms of Regulation 6(1)(c):

(1) “A person providing an information society service shall make available to the recipient of the service and any relevant enforcement authority, in a form and manner which is easily, directly and permanently accessible, the following information -

...

(c) the details of the service provider, including his electronic mail address, which make it possible to contact him rapidly and communicate with him in a direct and effective manner;

...”.

72. In the light of these provisions it is submitted by Ms Jethani that the requirements of Regulation 6(1)(c) are satisfied, since the Claimant was able to send an e-mail to BT on 1 May 2005. Also, his purported notice would fail to satisfy the factors identified in Regulation 22(1)(b)(ii) and (iii) for the reasons considered above. None of that information was included. As I have already observed, in order to be able to characterise something as “unlawful” a person would need to know something of the strength or weakness of available defences.
73. It is thus submitted that BT is not liable for hosting the publications in the light of the provisions of Regulation 19, and there is nothing to suggest that the Claimant would have any prospect of proving otherwise.
74. Against BT there is also set out, in paras. 20 to 22 of the amended particulars, a claim based upon harassment. It is suggested that there were harassing publications for which the third Defendant was responsible and that BT are responsible as “accessories”. Having regard, however, to the provisions of the Protection from Harassment Act 1997, it is clear that BT has not pursued any “course of conduct” within the meaning of s.1(1); nor could it be said that there is anything in the pleading to support the proposition that BT is liable in law for creating any of the publications relied upon as harassment. Nor yet could it be argued that BT ought to know that any course of conduct amounted to harassment, since the matter has to be assessed according to the information in the relevant defendant’s possession at the time and judged objectively: s.1(2).
75. The Claimant argues that it is inevitable that BT will be found to be a publisher at common law and therefore “is most certainly by definition the harasser”. As I have already explained, however, I do not accept his premise.
76. It is necessary to bear in mind in this context, as I have said, that the provisions of Regulation 19 would prevent any claim for damages, whether in respect of harassment or any other wrongful act.

77. In conclusion, I am quite satisfied that the claims against these applicants should be struck out in accordance with CPR Part 3, and indeed that there would be no realistic prospect of success on any of the causes of action. Thus the criteria under CPR Part 24 would also be fulfilled.
78. All counsel have additionally relied upon the argument that the litigation constitutes an abuse of process in accordance with the principles expounded recently by the Court of Appeal in *Jameel (Yousef) v Dow Jones and Co Inc* [2005] QB 946 at [56]–[58]. It is unnecessary to consider these arguments in any detail in the light of my earlier conclusions. They are nonetheless consistent with the public policy considerations highlighted in that case. Moreover, the language used in such cases as *Schellenberg v BBC* [2000] EMLR 296, *Wallis v Valentine* [2003] EMLR 175 and in *Jameel* itself would be equally applicable. It is fair to say that there is here “no realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court resources”.
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. I therefore accede to the submissions of the applicants and will grant orders accordingly.