

**THE HIGH COURT**

**2004 19924 P**

**BETWEEN**

**SEAMUS MULVANEY**

**PLAINTIFF**

**AND**

**THE SPORTING EXCHANGE LIMITED TRADING AS BETFAIR**

**DEFENDANTS**

**AND BY ORDER**

**ALAN CONNOLLY, PAULA CAREY, MARK McELROY, TONY KAVANAGH, PAT KEELEY AND JASON KELLY**

**THIRD PARTIES**

**2004 19925 P**

**AND**

**ELLEN MARTIN**

**PLAINTIFF**

**AND**

**THE SPORTING EXCHANGE LIMITED TRADING AS BETFAIR**

**DEFENDANTS**

**AND BY ORDER**

**HUGH HYNES**

**THIRD PARTY**

**JUDGMENT of Mr. Justice Clarke delivered on the 18th of March , 2009**

**1. Introduction**

1.1 These linked cases arise out of separate proceedings in which the plaintiffs, who are both bookmakers, claim damages for libel. The defendants ("Betfair") carry on business as a provider of a betting exchange, mainly through a website, Betfair.com. The website contains a chatroom, known on the site as the Betfair forum (the "Chatroom") in which registered customers of Betfair may make comments concerning sports, betting or other issues.

1.2 The libel proceedings concern comments posted on the Chatroom by registered clients of Betfair, being the respective third parties in each set of proceedings. The plaintiffs allege that the inclusion of the relevant comments on the Chatroom constituted a publication by Betfair of those comments and are pursuing a claim of libel against Betfair on that basis.

1.3 A variety of issues potentially arise in these proceedings. However, the parties were agreed that issues as to the applicability of Directive 2000/31/EC on certain legal aspects of information society services, in particular Electronic Commerce in the internet market ("the E-Commerce Directive") should be tried as preliminary issues in the respective proceedings. It seems likely that the central factual issues in the respect of these proceedings will be tried by a judge sitting with a jury as is the norm in defamation cases. On that basis it was, quite properly, felt by the parties that the issues of European Law which arise under the E-Commerce Directive could not conveniently be dealt with at the same time as a jury trial. This court agreed. For that reason issues concerning the applicability of the E-Commerce Directive were directed to be tried in advance of any trial of the remainder of the issues in these proceedings. The judgment is directed towards those issues. Against that background it is necessary to turn briefly to the issues which arise in the proceedings and the undisputed facts.

**2. Facts and Issues**

2.1 The parties agreed on certain facts for the purposes of this hearing. At the material time the Chatroom enabled only registered customers of Betfair to publish their respective opinions. The applicable rules of the Chatroom at that time, which were placed on the front page of the Chatroom webpage, were as follows:

"Any customer wishing to post a message agrees not to post any item that:

1. Is defamatory or discloses any information that the customer has no legal right to disclose.
2. Is (or contains anything which is) vulgar, hateful, obscene or insulting.
3. Contains any form of advertising, promotional materials or any form of commercial activity.
4. Contains any promotion of any competitors of Betfair of their products.

5. Contains any virus, corrupted files, "Trojan horses" or any other matter that could cause harm to the computer of any third party.
6. Contains any intentionally false or misleading statement or any statement seeking to unfairly manipulate a market.
7. Is an attempt to collect or store data about other customers.
8. Contains a link to any other website address of, or promotes the services of, a competitor of Betfair.
9. Is in a language other than English."

2.2 It is accepted that no betting activity takes place through the Chatroom. The Chatroom is maintained and run through a separate section of Betfair's website that does not include what is described as betting functionality.

2.3 Betfair has pleaded that it did not publish the relevant alleged libels. As an alternative or additional ground of defence, Betfair relies on the exclusion of liability for internet intermediaries contained in the E-Commerce Directive which was transposed into Irish law by the European Communities (Directive 2000/1/EC) Regulations, 2003 (S.I. 69 of 2003) (the "2003 Regulations"). In particular Betfair has pleaded that it is an "intermediary service provider" providing a relevant service consisting of the storage of information provided by a recipient of the service for the purposes of Regulations 18 of the 2003 Regulations. Betfair has pleaded that it has, in those circumstances, no liability to the plaintiffs where it says it had no actual knowledge of the publication of the alleged defamatory material, was unaware of the facts and circumstances giving rise to same and where it further says that and it acted expeditiously to remove the relevant material on obtaining knowledge of such facts and circumstances. In reply to the defence, the plaintiffs have pleaded that Betfair is not entitled to rely on the E-Commerce Directive or any provision thereof.

2.4 On 12 February 2007 Herbert J directed that these preliminary issues concerning the application of the E-Commerce Directive be tried without a jury. The questions so directed to be tried at this hearing are as follows:-

1. Whether the defendant in the provision of the Chatroom for its subscribers through its website known as Betfair.com falls within the scope of the

E-Commerce Directive? If the answer to issue 1 is yes then the following issues fall to be determined.

2. Whether the defendant is an "intermediary service provider" within the meaning of the 2003 Regulations?

3. Whether the provision by the defendant of the Chatroom for its subscribers through Betfair.com constitutes the "provision of a relevant service consisting of the storage of information provided by a recipient of the service" within the meaning of the 2003 Regulations?

2.5 In substance there are two sets of issues. Firstly, as will be seen, the E-Commerce Directive and the 2003 Regulations contain a gambling exclusion. The first set of issues are as to whether that exclusion applies in this case so as to take the Betfair Chatroom outside the scope of the protection of the Directive and the Regulation. In the event that the gambling exclusion does not apply a second set of issues arise as to whether the protection of the Directive and the Regulation apply to Chatrooms.

2.6 In those circumstances, it is appropriate to turn first to the E-Commerce Directive.

### **3. The E-Commerce Directive**

3.1 The E-Commerce Directive was put in place to remove obstacles to cross-border online services and to provide a legal framework for E-Commerce. The E-Commerce Directive, amongst many other things, defines the circumstances in which internet intermediaries, as defined, can be held accountable for material which is hosted, cached or carried by them but which they did not create. The relevant provisions are not confined to the publication of defamatory material.

3.2 The principal provision relevant to the issues in these proceedings is Article 14 of the E-commerce Directive, which relates to "hosting" and provides as follows:-

"1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information."

3.3 "Hosting" requires that the data is stored by the intermediary for a period rather than just passing through the intermediary. This latter activity would mean that the intermediary was instead either operating as a mere conduit or caching, which activities are covered by distinct Articles in the E-Commerce Directive. While acting as a mere conduit

covers the automatic, intermediate and transient storage of information transmitted for the sole purpose of carrying out the transmission and is covered by Article 12, caching is a process which enables internet providers to speed up the delivery of web pages to internet users by making a temporary copy of the web page that is requested by a user and is covered by Article 13 of the Directive.

3.4 Article 14 of the E-Commerce Directive was transposed into Irish law by Regulation 18 of the 2003 Regulations , which provides as follows:-

"18. (1) An intermediary service provider who provides a relevant service consisting of the storage of information provided by a recipient of the service shall not be liable for the information stored at the request of that recipient if -

(a) the intermediary service provider does not have actual knowledge of the unlawful activity concerned and, as regards claims for damages, is not aware of facts or circumstances from which that unlawful activity is apparent, or

(b) the intermediary service provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

(2) Paragraph (1) shall not apply where the recipient of the service is acting under the authority or the control of the intermediary service provider referred to in that paragraph.

(3) This Regulation shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights."

3.5 Additionally Regulation 15 provides for the limitation of liability of relevant service providers as follows:-

"A provision of Regulation 16, 17 or 18 providing that a relevant service provider shall not be liable for a particular act shall be construed as a provision to the effect that the provider shall not -

(a) be liable in damages or, unless otherwise provided, be liable to be the subject of an order providing for any other form of relief, for infringing, by reason of that act, the legal rights of any natural or legal person or, by reason of that act, for breaching any duty, or

(b) be liable to be subject to any proceedings (whether civil or criminal) by reason of that act constituting a contravention of any enactment or an infringement of any rule of law."

It is clear, therefore, that if Betfair come within the provisions of Article 14 / Regulation 18, then there can be no liability for information stored provided it can be shown that Betfair:-

a. did not have actual knowledge of the unlawful activities, i.e. the allegedly defamatory comments posted on the Chatroom;

b. were not aware of the allegedly defamatory comments; and / or

c. On being made aware of the potentially defamatory comments, acted expeditiously to remove or disable access to the comments.

3.6 However the plaintiffs argue that Betfair is not entitled to rely on the provisions of the 2003 Regulations because of what is said to be an exemption in respect of gambling activities. It follows that, if the plaintiffs are correct, the E-Commerce Directive and the implementing 2003 Regulations are irrelevant to these proceedings. I turn firstly, therefore, to the terms of the gambling exemption.

#### **4. Whether the provision of a chatroom falls within the scope of the E-Commerce Directive – the Gambling Exemption**

4.1 The plaintiffs have pleaded that, in circumstances where Betfair's business is said to be a gambling activity within the meaning of the E-Commerce Directive, Betfair is not entitled to rely on that Directive because the Directive is said to not apply to gambling activities.

4.2 In relation to this argument the plaintiffs rely on Article 1(5)(d) of the Directive which provides that the Directive does not apply to the following:-

"gambling activities which involved wagering a stake with monetary value in games of chance, including lotteries and betting transactions."

4.3 The corresponding Regulation 2(f) of the 2003 Regulations provides that:

"These Regulations do not apply to the following activities...

...(f) activities to which the Betting Act, 1931, the Gaming and Lotteries Acts, 1956 to 1979 or the National Lottery Act, 1986 applies or apply."

4.4 Section 2 of the Gaming and Lotteries Act, 1956 defines "gaming" as "playing a game (whether of skill or chance or partly of skill and partly of chance) for stakes hazarded by the players", and defines "lottery" as including "all

competitions for money or money's worth involving guesses or estimates of future events or of past events the results of which are not yet ascertained or not yet generally known". Section 1 of the National Lottery Act, 1986 defines "lottery game" as "any game, competition or other procedure in which or whereby prizes (whether money prizes or otherwise) are distributed by lot or chance among persons participating in the game, competition or other procedure".

4.5 Betfair argued that the activities of the Chatroom do not involve gambling activities, as defined by the relevant sections of the Directive or the Regulations and, it is said, any exclusion on the availability of the protections conferred by the E-Commerce Directive in favour of gambling activities does not apply to the publication in the Chatroom of comments concerning the plaintiffs.

4.6 In *Piergiorgio Gambelli & Other* (Case C-243/01) the European Court of Justice noted the position of the Commission in that case to the effect that the E-Commerce directive "does not apply to bets". Furthermore at paragraph 46 of the opinion of the Advocate General Bot in *Liga Portuguesa de Futebol Profissional (CA/LPFP) Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* (Case C-42/07), a case concerning the conformity with EU law of a Member State's legislation which restricted gambling operators, the Advocate General highlighted that games of chance and gambling are not the subject of regulation or harmonisation within the European Union. Betfair submitted that *Piergiorgio Gambelli* can be distinguished from the facts in this case as the activity of the provider then concerned involved the collection of bets through the internet whereas the activities carried out via the Chatroom do not, it is said, amount to gambling or wagering a stake.

4.7 Betfair further submitted that such an interpretation is strengthened by the provisions of Recital 16 of the E-Commerce Directive which states that:

"The exclusion of gambling activities from the scope of the application of this Directive covers only games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value."

4.8 The issue of principle which I have to determine is, therefore, as to the extent of the gambling exclusion. There was some debate at the hearing before me as to whether there was an exact correspondence between the exclusion contained in Article 1(5)(d) of the E-Commerce Directive, on the one hand, and Regulation 2(f) of the 2003 Regulations on the other hand. The relevant provision of the Directive refers to gambling activities generally "including lotteries and betting transactions". In seeking to transpose the Directive into Irish Law, the 2003 Regulations exclude activities defined by reference to specific legislation, being the Betting Act, 1931, the Gaming and Lotteries Act, 1956 – 1959 and the National Lottery Act 1986. There may be some doubt as to whether, strictly construed, the provisions of Regulations 2(f) of the 2003 Regulations is as broad as the exclusion set out in Article 1(5)(d) of the Directive. The exclusion specified in the Directive appears to relate to any form of gambling activity. In that context it is necessary to make some reference to the precise manner in which a betting exchange is conducted.

4.9 The proprietors of a betting exchange are not, directly, involved themselves in making the bets struck using the exchange concerned as a facility. Rather the betting exchange facilitates two of its customers in entering into a bet on a relevant event. In simple terms a betting exchange typically opens a market on a relevant event (such as a sporting event). Its customers are entitled to offer to accept bets on the various eventualities that might arise in the sporting event – which horse will win; what the result of the game may be or the like. Provisions are in place to ensure that all customers have adequate funds to meet the potentially adverse consequences of losing any bet which might be struck. The bets which customers are willing to make available can be found on the relevant website. Other customers willing to accept a bet on offer can do so in an automatic way through the website. On that basis the actual bet is struck between the two customers concerned. For example, in the context of a horse race, a customer may indicate a willingness to offer a bet at (say) 4/1 on a particular horse. Another customer may be willing to accept that bet. The bet itself will amount to a bet between the two customers whereby the first customer will pay out at 4/1 in the event that the horse should win and the second customer will pay out the agreed stake in the event that the horse should lose.

4.10 The betting exchange makes its profit by taking a commission on all bets struck. As a result of a query raised by me in the course of the hearing, it was accepted by counsel on behalf of Betfair that the commission obtained by Betfair may vary depending on the customer concerned and is also only deductible from winning bets. It is true, therefore, that, in general terms, the extent of the commission paid to Betfair may be, to some extent, dependant on the result of the event.

4.11 There can be little doubt but that what is engaged in on the Betfair website, insofar as that website facilitates the entering into of bets between its customers, is gambling in the sense in which that term is used in the E-Commerce Directive. The more difficult question concerns whether the relevant activity is covered by the provisions of the implementing the Regulation of 2003. The issue stems from the fact that betting, *per se*, does not appear to be covered by any of the relevant statutory provisions set out in that regulation.

4.12 The Betting Act 1931 is concerned not with betting *per se*, but rather with regulating the activities of bookmakers. While bookmaking is not defined in that legislation it seems to me that the term bookmaker derives from a person or body "making a book" on an event. In other words, the person or body concerned offers odds on all or a significant number of eventualities arising in respect of the same event (for example, offers odds on each horse winning or offers odds on either team winning a football game, or, indeed that game resulting in a draw). Thus, a person carrying on the business of bookmaking is someone who habitually offers to cover a range of possible eventualities on future uncertain events. Two private individuals entering into a wager on the same future uncertain event could not remotely be said to be engaged in the business of bookmaking. It is, of course, possible that someone might engage in the business of bookmaking through a betting exchange. A customer of a betting exchange who regularly offers a range of bets on the same event might well be taken to be engaged in bookmaking. If that person did not have the necessary licence under the Betting Act, 1931, then such activity might well be unlawful. However, the simple act of the placing of an individual bet as and between two customers of Betfair is not in itself an activity which is governed by the Betting Act, 1931 subject only to the possibility that one or both of the individuals concerned might be engaged in bookmaking and might, thus, be caught by the provisions of the 1931 Act. Making a bet *per se* is not, therefore, an activity covered by the Betting Act 1931.

4.13 It is possible that the provisions of the Gaming and Lotteries Act, 1956 to 1979 do apply to a betting exchange, having regard to the fact that the commission earned by the betting exchange operator may vary depending on the result of the event. However, I have come to the view that it is not necessary to come to a conclusion on this issue in this

case and that it would be preferable not to do so but to await a case in which the issue was decisive. I have to come to this view for two reasons.

4.14 Firstly, and most importantly, it does not seem to me, for reasons which I will set out, that the issue is decisive in this case. If the activities of Betfair are not caught by the gambling exclusion as defined in the relevant provisions of the 2003 Regulations, then it is clear that the gambling exclusion can have no applicability to this case. Subject to the other issues which would, necessarily, arise, Betfair would, at the level of principle, be entitled to place reliance on the E-Commerce Directive.

4.15 On the other hand I have come to the view that both the relevant provisions of the Directive and the relevant provisions of the implementing 2003 Regulation are concerned with "activities". The focus of the gambling exclusion, in either case, is centred on the relevant activity, rather than what might be said to be the general business of the person engaged in the activity concerned. While it is undoubtedly true to say that the general business of Betfair involves Betfair facilitating betting, it seems to me that the "activity" with which I am concerned in this case is not betting in any sense of the word but rather the provision of a chatroom. It is common case that there is no direct connectivity between the chatroom and the betting section of the Betfair website. It is true to state that both betting and chatroom activities can be conducted on the same website. However the respective activities are conducted on separate parts of the website with no connectivity. Likewise, the "activities" concerned are very different. A person who makes comments on the chatroom may or may not engage in any betting activity connected with the issues debated on the chatroom. There is, in my view, no significant nexus between the chatroom activity, on the one hand, and the betting activity, on the other hand, which could reasonably lead to the characterisation of the chatroom as being part of any betting activity that might be said to take place on the Betfair website.

4.16 On that basis, I am satisfied that, even if the activities of a betting exchange are caught by the provisions of Regulation 2(f) of the 2003 Regulations, that Regulation could have no applicability to chatroom activities unconnected with the act of betting.

4.17 On the facts of this case it does not seem to me, therefore, that the question of whether the 2003 Regulation is narrower in scope in its definition of gambling activities than the E-Commerce Directive, really arises. If it be narrower in scope so as to exclude a betting exchange from the gambling exclusion, then the only consequence would be that the E-Commerce Directive would fully apply to the activities of the betting exchange. If it be not narrower in scope, then it is clear that, while the E-Commerce Directive would not apply to betting activities as such, the directive would, nonetheless, apply to unconnected other services provided on the same website, such as a Chatroom. In either event it seems to me that Chatroom services of the type offered by Betfair in the context of this case are within the scope of the E-Commerce Directive.

4.18 Attention was drawn by counsel for the plaintiffs to the fact that the recitals to the E-Commerce Directive make the point that betting and gambling activities are as yet unharmonised within the European Union. There can be little doubt but that the reason for the exclusion of gambling activities from the scope of the E-Commerce Directive is because of that very fact. Member States operate widely differing regimes in respect of gambling. Where gambling is conducted electronically, very difficult issues arise concerning jurisdiction and territoriality. It was, doubtless, considered impossible to seek to apply the E-Commerce Directive to gambling activities where the laws of Member States differed so radically. However, it should be noted that while the focus in this case has been on the provisions providing exclusion for intermediaries, the E-Commerce Directive deals with many other issues and the gambling exclusion applies in all cases. The gambling exclusion should not be seen as being particularly focused on intermediary activities.

4.19 In addition, even if there were some differences in the text of the relevant provisions of the E-Commerce Directive, on the one hand, and the 2003 Regulations, on the other hand, concerning the definition of gambling, it would be necessary to have regard to the need to construe, if at all possible, the implementing measures, ie. the 2003 Regulations, so as to bring same into conformity with the Directive. As such questions of construction are likely to be important it is all the more appropriate that a definitive view on same is postponed to a case where any possible distinction between the two measures would be decisive.

4.20 For all of those reasons I have come to the view that question 1 must be answered "yes". The gambling exclusion does not prevent Betfair from placing reliance on the E-Commerce Directive in respect of chatroom activities. In those circumstances it is necessary to turn to the other issues which arise.

## **5. Whether Betfair is an "intermediary service provider" and whether provision of a chatroom comes within the E-Commerce Directive**

5.1 The two remaining issues are interlinked and so must be dealt with under the same heading. Those issues are as to whether the provision of a chatroom comes within the meaning of "provision of a relevant service consisting of the storage of information provided by the recipient of the service" and whether the defendant is an "intermediary service provider" within the meaning of the E-Commerce Directive.

5.2 As stated earlier, Regulation 15 of the 2003 Regulations sets out the exclusion of liability that is available to a "relevant service provider" under Regulations 16 to 18. Regulation 18, which limits the liability of providers of "hosting" services, refers to an "intermediary service provider" and not a "relevant service provider". Betfair submitted that it was the legislator's clear intention when drafting the 2003 Regulations that a "relevant service provider" included an "intermediary service provider" for the purposes of the application of Regulation 16 to 18 of the Regulations. If there was any doubt with this interpretation, the intentions behind the relevant Articles of the E-Commerce Directive would have to be looked to for guidance. The corresponding Articles of the Directive are Articles 12 to 14. These Articles apply to providers of an "information society service".

5.3 The definitions contained in Regulation 3 provides that "relevant service provider" means any natural or legal person providing a relevant service" and "relevant service" is defined as:-

"an information society service within the meaning of Article 1 of directive 98/34/EC as amended by directive 98/48/EC, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at

the individual request of a recipient to the service, other than a service specified in Scheduled 1 to these Regulations."

5.4 The Regulations clearly envisage that the relevant service providers are providers of an "information society service". Accordingly, I agree with Betfair that an "intermediary service provider" falls within the definition of "relevant service provider" as defined by the 2003 Regulations.

5.5 Whether or not Betfair can establish that the Chatroom constitutes an "information society service" is directly related to answering the question of whether Betfair is an "intermediary service provider" or "relevant service provider", as described in the 2003 Regulations.

5.6 As stated earlier, the definition of "information society service" is found in Article 1(2) of Directive 98/34/EC relating to the provision of information in the field of technical standards and regulations and of rules on Information Society services and covers any service, normally provided for remuneration, at a distance, by means of electronic equipment for the processing and storage of data at the individual request of a recipient. The relevant Article provides that an information society service is any "service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services". For the purposes of this definition:-

"'at a distance' means that the service is provided without the parties being simultaneously present,

'by electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received wire, by radio, by optical means or by other electromagnetic means,

'at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request."

5.7 It is observed by Dr Matthew Collins in *The Law of Defamation and the Internet*, para 17.03 that: "Commercial Internet intermediaries, such as ISPs, bulletin board operators, and web hosting services will usually satisfy this definition." It is also clear from the recitals to the E-Commerce Directive that information society services span a broad range of activities available over the internet.

5.8 Betfair referred to the English case of *Bunt v Tilley* [2007] 1 WLR 1243, which also concerns libel proceedings against internet service providers, who, as intermediaries, provided a route to the internet which enabled third parties to pass electronic communications from one computer to another facilitating postings to a message board, hosted by other providers. The claim raised points of general significance as to the basis on 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. At page 1252 of his judgment, Eady J considered the applicability of the UK regulations implementing the Directive as follows:

"The claimant asserts that these defendant 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 bit of definition. No such restrictive definition appears in the regulations. Nor would it accord with the declared policy underlying them."

5.9 Thus the court found that the defendant had satisfied the criteria of "information society service" providers. I agree with the broad interpretation given to the definition of intermediary service providers in *Bunt v. Tilley*.

5.10 Betfair submitted that, in the present case, it is the third parties who provided the information in question, i.e. the allegedly defamatory comments, and that Betfair stored this information on its servers that hosted the Chatroom. Betfair submitted that this service was provided at a distance by electronic means and at the individual request of the recipient of the service. It is submitted by Betfair that it, therefore, acted as "hosts" of that information for the purposes of Regulation 18 of the 2003 Regulations.

5.11 At Recital 20, the E-Commerce Directive states that:-

"The definition of 'recipient of a service' covers all types of usage of information society services, both by persons who provide information to open networks such as the Internet and by persons who seek information on the Internet for private or professional reasons."

5.12 It seems to me that this provision clearly covers such use of the services provided by the defendant as was made by the third parties in these proceedings. Furthermore, at Recital 18 of the E-Commerce Directive, it is provided, *inter alia*, that:-

"Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consists of selling goods on-line; activities such as the delivery of goods as such or the provision of service off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service."

5.13 There is no case law dealing directly with the question of whether Regulation 18 covers the provision of Chatroom facilities. However the E-Commerce Directive appears to apply to chatrooms if they are hosting information provided by a recipient of the service and available to other users of the service. In addition, the corresponding Article to Regulation 18

(i.e. Article 14), has been recognised in the Report from the Commission to the European Parliament on the application of the E-Commerce Directive, where at page 12 , it states:-

"In particular, the limitation on liability for hosting in Article 14 covered different scenarios in which third party content is stored apart from the hosting of websites, for example, also bulleting boards or 'chatrooms'."

5.14 As the service provided by Betfair, through its Chatroom, clearly falls within the meaning of "relevant service" as defined by the 2003 Regulations, it follows that Betfair, in providing this service, is a "relevant service provider" and so an "intermediary service provider" within the meaning of the 2003 Regulations. Betfair is, therefore, entitled to the benefits of Regulations 15 and 18 of the 2003 Regulations.

## **6. Conclusions**

6.1 It follows that, for the reasons set out earlier, the gambling exclusion does not prevent Betfair from placing reliance on the E-Commerce Directive as a defence in these proceedings. For the reasons which I have just sought to analyse, I am also satisfied that the provision of a chatroom service comes within the definition of an intermediary service provider contained in the 2003 Regulations, and that the provision of that service to its subscribers by Betfair constitutes the provision of a relevant service consisting of the storage of information provided by a recipient of the service within the meaning of the same Regulations.

6.2 It follows that Betfair are, in principle, entitled to the protection of the E-Commerce Directive in these proceedings. In order to be able, successfully, to defend the proceedings on that basis it is, of course, also necessary that Betfair be able to establish, as a matter of fact, in each individual case, that the conditions concerning knowledge and expeditious action set out in subparas (a) and (b) of Article 14 of the E-Commerce Directive are met. Whether that can be established on the facts of this case is a matter which did not arise on this preliminary hearing and will fall to be determined at the trial.

6.3 However, it follows that, provided that Betfair can establish those matters as facts at the trial, Betfair is entitled to the protection of the E-Commerce Directive.