Neutral Citation Number: [2006] EWHC 1224 (QB)

Case No: HQ05X03565

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 May 2006

Before:

THE HON. MR JUSTICE GRAY

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Between:

LOUGHTON CONTRACTS Plc	**Claimant**
- and -	
DUN & BRADSTREET LIMITED	**Defendant**

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- -

Mr Richard Parkes QC and Mr William Bennett
(instructed by **Foskett Marr Gadsby & Head**) for the **Claimant**
Mr Mark Warby QC and Mr Adam Speker
(instructed by **Bird & Bird**) for the **Defendant**

Hearing dates: 17 May 2006

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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 GRAY

Mr Justice Gray:

1. This is in form an application by the Claimant, Loughton Contracts Plc, for summary judgment against the Defendant, Dun & Bradstreet Limited. There is also an ancillary application for the provision of Further Information. In reality, however, it is an application which is concerned with the offer of amends procedure which is to be found in sections 2 to 4 of the Defamation Act 1996. The principal point which arises for decision is whether the unqualified offer of amends made by the Defendant (that is, an offer which does not dispute the Claimant's pleaded meaning) has been accepted by the Claimant. The Defendant asserts that its offer has not been accepted; the Claimant asserts that it has.

2. This gives rise to a conundrum about the jurisdiction of the court. If the Defendant's offer has been validly accepted, it is clear from section 3(2) of the Act that the Claimant "may not bring or continue defamation proceedings in respect of the publication concerned against the person making the offer". It follows that, if my decision were to be that the offer of amends has been accepted (as the Claimant contends), it might be said that the court has no jurisdiction to entertain an application for summary judgment in the action. Even if that be right, I need not dwell on this jurisdictional point. The reason why I say that is that the parties have sensibly agreed that I have an inherent jurisdiction, irrespective of the provisions of the Act, to determine what the position is in regards to the issue whether the offer of amends has been accepted. They consent to my hearing the application.

3. As is well known the Defendant is a credit reference agency. It collects and analyses financial data on various companies and sells the results to customers who wish to be informed of particular companies' credit worthiness and financial standing. The Claimant is one such company about which the Defendant has financial data. The Claimant specialises in the large scale supply and fitting of flooring for major construction projects.

4. It is common ground that from about December 2004 until at least 31 May 2005, the Defendant published to a number of the Claimant's customers and potential customers a document entitled *"D & B Comprehensive Report"*. According to the Claimant's case that publication bore the natural and ordinary meaning that:

> "the Claimant has an appalling record for maltreating its creditors; it is so chronically delinquent in paying its debts that it has failed to pay monies owed by it within the agreed time in 94% of cases and on average it pays its debts 165 days after the deadlines for paying them have expired".

There is a further meaning which the Claimant contends was borne by the words either in their natural and ordinary meaning or by innuendo, namely that:

> "it is highly likely that the Claimant has serious financial problems and is on the verge of defaulting on its debts and going bust".

5. A letter of complaint was written about the circulation of the report on 1 June 2005. Thereafter the Defendant promptly notified those who had received the report

complained of (and, as it happens, some who had not) about the complaint and did their best to correct it. By e-mail dated 29 June 2005 an enquiry was made of the Defendant as to the identity of the person or company who had made enquiries about the Claimant. The Defendant declined to provide that information on grounds of confidentiality. Thereafter there was a period of inactivity. The Claimant issued the present proceedings for damages for libel on 2 December 2005.

6. The Particulars of Claim allege that the report was published to at least 23 of the Claimant's customers and potential customers. The statement of case concludes with the following paragraph:

> "In support of its claim for general damages, the Claimant will rely upon the fact that the publications complained of have caused an as yet unquantifiable financial loss to it because of the negative effect that they have had upon persons with whom and organisations with which it conducts or might conduct business, thus wrongly depriving the Claimant of income (the Claimant reserves its right to plead further particulars in this regard in due course and to claim special damages)".

7. The Defence pleads that in the relevant period (December 2004 to June 2005) the report was published to only eleven of the Claimant's customers. The Defence pleads no affirmative defence. Instead reliance is placed in paragraph 4 upon the Defendant's unqualified offer to make amends pursuant to section 2 of the Defamation Act 1996, which it is asserted has neither been withdrawn by the Defendant nor accepted by the Claimant. There follows a paragraph which sets out the facts and matters upon which the Defendant intends to rely in mitigation of any damage or compensation award. That paragraph includes a denial that it is permissible for the Claimant to reserve the right to claim special damages, which it is asserted must be pleaded and particularised.

8. Before I turn to the arguments advanced on the application, it will be convenient if I say something of the offer of amends regime. Its provenance is usefully described in the judgment of Eady J in *Abu v MGN Limited* [2003] 1 WLR 2201. Section 2 of the 1996 Act lays down certain requirements as to the form and contents of an offer of amends. In particular it must by virtue of subsection 4 be an offer:

> "(a) to make a suitable correction of the statement complained of and a sufficient apology to the aggrieved party,
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> (b) to publish the correction and apology in a manner that is reasonable and practicable in the circumstances and
>
> (c) to pay the aggrieved party such compensation (if any), and such costs, as may be agreed or determined to be payable".

Subsection 5 provides that an offer of amends may not be made by a person after serving a defence in defamation proceedings, i.e. the offer must precede the Defence.

9. Section 3 of the Act deals with the consequences of an acceptance of the offer by the aggrieved party. As I have already said, acceptance precludes the bringing or continuing of defamation proceedings in respect of the publication in question. Subsections 5 and 6 provide that the amount to be paid by way of compensation and costs shall be determined by the court on the same principles as damages in defamation proceedings.

10. Finally, section 4 of the 1996 Act deals with the position which arises where there has been a failure to accept the offer to make amends. It provides that the making of an offer is a defence unless it can be proved that the person by whom the offer was made knew or had reason to believe that the statement complained of referred to the aggrieved party and was both false and defamatory of that party.

11. Relatively recent though the introduction of the offer of amends regime is, it has received some judicial consideration. In *Abu v MGN Limited* Eady J said at paragraph 8:

> "8. In this instance, it must provide an incentive to defendants to make the offer and to claimants to accept. In either case, a rational decision can only be made if it is possible within reasonable limits to predict the range of outcomes to which one is committing oneself. For example, before making an offer a claimant needs to be able to assess the gravity of the impact of the libel upon the complainant's reputation and feelings, and this will generally have to be done in the light of the Particulars of Claim and/or letter before action. It would not seem fair if an offer is made and accepted on one basis, and the complainant then reveals for the first time elements of pleadable damage not previously mentioned, such as for example that his marriage has broken down or that he has lost his employment.
>
> 9. It would only accord with most people's sense of justice if the offer of amends is construed as relating to the complaint *as notified*. Such an approach would also accord with the modern "cards on the table" approach to litigation generally and, more specifically, with the thinking behind the Defamation Pre-Action Protocol".

12. Later in his judgment Eady J describes the offer of amends procedure as one which is by no means always going to lead to a speedy and cheap resolution in any ordinary sense but, where it is adopted, should generally be speedier than the traditional process of jury trial. Eady J adds that sometimes, although he would think relatively rarely, it may be necessary for there to be some disclosure of documents after the offer has been accepted, particularly with regard to certain heads of damage.

13. The offer of amends procedure was also considered in *Nail v News Group Newspapers Limited* [2005] 1 All ER 1040. In that case May LJ, with whom the other members of the court agreed, said at paragraph 15:

> "Speaking generally, there may of course be evidence from both sides relevant to the determination of compensation. But in principle it seems that the claimant should not normally be permitted to enlarge significantly pleaded allegations upon which the offer to make amends was made and accepted, for example by promoting a new case of malice. Nor should a defendant, who has made an unqualified offer which has been accepted, be permitted to water down significantly the pleaded allegations. Claimants should therefore plead the full substance for which they seek redress: defendants who wish to make amends for significantly less than that full substance should make appropriate qualifications to their offer".

14. With those observations in mind, I turn to the correspondence between the parties' respective solicitors which bears upon the question whether or not the offer of amends was accepted by the Claimant in the present case. The offer is contained in a letter dated 3 February 2006. Its opening paragraphs read:

> "As you are of course aware we have been trying to settle this matter by negotiation with you. We have been unable to do so and write now to make an offer of amends under section 2 of the Defamation Act 1996. This is intended to cover your client's defamation claim as pleaded in the claim form and the particulars of claim.
>
> It is an unqualified offer to publish a suitable correction and sufficient apology; to publish that correction and apology in a manner that is reasonable and practicable in the circumstances; and to pay such compensation and costs as are agreed or determined to be payable".

15. Under the cross-heading "damages", the letter states that, unless agreement can be reached, it will be a matter for the court to determine how much compensation, if any, should be paid by the Defendant to the Claimant. The writer then sets out a number of matters that the Defendant will rely upon in mitigation of damages. That part of the letter includes an assertion that the Claimant has not pleaded any special damage as it is required to do under CPR Part 16 and that it cannot merely hold out the right to do so at some unspecified time. The letter makes clear that the offer of amends is made only in respect of the damage claimed to date.

16. Pausing at this point, it appears to me to be quite clear both from the opening paragraph of the letter and from the later reference to special damage, that the offer is predicated upon the basis that the Claimant's pleaded claim is for general damages only. I accept that as a matter of the construction of the Particulars of Claim, that is correct: paragraph 7, which I have quoted earlier, is prefaced by the words "in support of its claim for general damages". The pleading appears to me to contain no claim for special damages, although the right to do so at some time in the future is reserved.

17. Solicitors on behalf of the Claimant by their letter of 13 February 2006 protested at the posture being adopted on behalf of the Defendant. Mr Richard Parkes QC, who has appeared on this application on behalf of the Claimant, accepts that this letter does

not purport to accept the offer. Indeed, the letter concludes by saying that, whilst in principle the Claimant would like to accept a truly unconditional offer of amends, the Defendant must understand that the Claimant does not resile from its stance that it has a right, following such acceptance, to advance, amongst other things, a claim for special damages should the facts of the case warrant it. In its solicitors' reply dated 24 February 2006 the Defendant makes clear its view that, in the event that the matter proceeds to a compensation hearing [under the offer of amends procedure], the Claimant should not be able to pursue a case in special damage about which the Defendant had not been notified.

18. The next letter dated 9 March 2006 is the one which Mr Parkes contends amounts to an acceptance of the offer of amends. Having made clear that they maintain that the Claimant would be entitled to make a claim in special damages once the identities of the pubslishees had been disclosed, the solicitors for the Claimant continue:

> "Our client accepts your offer of amends, however, in doing so it maintains its right to do the following and will apply to court if necessary in order to enforce those rights:
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> - to be compensated for all publications which were made by your client, regardless of when they were made, under the offer of amends procedure. We regard your offer of amends has having been made in regard to all publications of the report whether they took place before or after 2 December 2004;
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> - to be informed, whether via disclosure or otherwise, of the identity of all of the publishees; and
>
> - to then make a claim for special damages once it has investigated the effect of the words complained of upon all of the publishees i.e. it will claim such damages if it can establish a case that as a result of the report being published to one or more entities our client lost business as a result".

19. In answer to that letter the Defendant's solicitors make clear that they consider that the Claimant had rejected the offer of amends but they in effect offer the Claimant a *locus poenitentiae* by saying "that unless the Claimant accepts the offer by 4pm on 23 March 2006 the Defendant will have no choice but to treat your client's response as a rejection of the offer".

20. The last letter to which I need to refer is one from the Claimant's solicitors dated 21 March 2006. The material paragraph is the second one which reads:

> "As already made clear in our letter of 9 March 2006, our client accepts the offer of amends made by your client further to section 2 of the Defamation Act 1996. There is clearly a disagreement between the parties as to the precise scope of the statutory offer but this will have to be resolved, if necessary, by the court".

Mr Parkes accepts that the last sentence which I have quoted refers back to the conditions which have been stated in the Claimant's earlier letter of 9 March 2006. It seems to me that, if the letter of 9 March does not constitute a valid acceptance of the offer of amends, the later letter of 21 March cannot do so either.

21. Mr Parkes submitted that it would be wrong to approach the question whether the offer of amends had been accepted by adopting the principles which are applicable in a contract case. In the alternative he submitted that, even if a contractual analysis is appropriate, it would be wrong to treat the letter of 9 March 2006 as a counter offer. Mr Parkes referred me to paragraph 2-091 of the current edition of *Chitty on Contracts*. As Mr Mark Warby QC pointed out on behalf of the Defendant, however, the relevant sections of the Defamation Act are couched in terms of offer and acceptance. In any case he submits that it is impossible to construe the letter of 9 March 2006 as an "acceptance" of the offer in any meaningful sense of that word. He says his client's offer has not been accepted at all.

22. I prefer the submission of Mr Warby on this point. I can express my reasons for doing so quite shortly. As I have already pointed out, the letter of offer dated 3 February 2006 makes abundantly plain that the offer is intended to cover the Claimant's defamation claim "as pleaded" in the Particulars of Claim which contain no claim for special damage. The offer is made only in respect of the damage claimed to date. The assertion that there is no claim for special damage on the existing statement of case is plainly right. The claim is expressed to be a claim for general damages. The right to claim special damages is expressly reserved, which must mean that there is no such claim in existence. As to the letter of 9 March 2006, relied on by the Claimant as constituting an acceptance of the offer, I have reached the clear view that it does not match the Defendant's offer in that the purported acceptance of that offer is coupled (in the same sentence) with an assertion of a right, amongst other things, to make a claim for special damages at some point in the future. Not only can that not be said to be an acceptance of the offer of amends, it also runs counter to the basis on which the offer was expressly made, namely that the offer covered the Claimant's claim as pleaded. It is, to adopt the language of the law of contract, a counter-offer.

23. Mr Parkes did, however, make a submission with which I have considerable sympathy. He argued that it is unfair to a claimant, if he is unable to discover the true extent of the damage before deciding whether or not to accept an offer of amends, to be compelled (if he wishes to discover it) to refuse the offer and thereby face a section 4 defence which will almost certainly be impossible to defeat. Mr Parkes contends that there is no reason why a defendant should expect to be fully informed about the scope of a claimant's claim for damage before making an offer of amends, especially in circumstances like the present, where the Defendant was at all times alive to the Claimant's concern about the extent of publication and the possibility of a special damage claim.

24. As to this, I have two observations to make. The first is that Mr Warby is entitled to make the rejoinder that it would be equally unfair for a defendant who makes an offer of amends on the footing that the claim for damages is confined to that set out in the claimant's pleading, only to find himself faced at a later date (and after committing himself to the offer of amends route) with a very much more substantial claim for damages. My second observation is that for me to accept Mr Parkes' submission

would fall foul of the passage from *Nail v News Group Newspapers Limited* quoted at paragraph 13 above. It seems to me that the procedural code laid down in sections 2 to 4 of the Defamation Act 1996 is a relatively strict one and that the scope for enlarging the claim for damages after the offer of amends has been accepted is and should remain limited in the way suggested in *Nail*. I appreciate that this may sometimes create difficulties for claimants but they are not insuperable difficulties. In the present case, for example, it would have been possible for the Claimant either to assert a claim for special damage in the particulars of claim, giving the best possible particulars in support of it, or, failing that, to make application for pre-action disclosure in order to enable such particulars to be pleaded.

25. It follows from my conclusion that the offer of amends has not been accepted that the application for summary judgment must be refused. The question was canvassed in argument what is the position that then arises: can Mr Parkes accept the offer here and now, as he purported to do in the course of his submission? Alternatively is Mr Parkes right when he submits that the words "is not accepted by the aggrieved party" in section 4 subsection 1 of the Act must be construed to mean "is rejected by the aggrieved party" with the result that no defence is available under subsection 2 because the offer of amends has not been rejected by the Claimant.

26. Mr Warby on behalf of the Defendant does not accept either of those propositions. In support he cited a passage from the 19th Edition of *Clerk & Lindsell* which reads as follows:

> "There is no concept in the 1996 Act of 'rejection' of an offer of amends by the claimant and no time limit within which to accept it. Under general contractual principles the rejection of an offer amounts to a termination of the offer which means that it cannot be subsequently accepted. Even where an offeree does not specifically reject the offer, his conduct may be held to amount to a rejection. Pursuing the claim following an offer of amends may therefore be held to amount to rejection. The decision on whether or not to accept the offer occurs at an early stage of the litigation, before disclosure. The claimant may not be in the best position to assess whether he has a strong case on disqualification. If he does not accept the offer then he may be deemed to have rejected it and may not therefore be able to accept it later when he subsequently discovers that he is on weak ground in relation to disqualification…
>
> To allow a claimant who fails to accept an offer when it is made to have the option of accepting it at a later stage would be contrary to the aim of the defence which is to encourage speedy disposal. Claimants could elect to proceed in the hope of finding material on disclosure or later to support their case on disqualification. If none emerged they might accept the offer late in the day. If this were to be permitted, the court should generally make the claimant pay the costs thrown away by failing to accept the offer when it was made, on the basis that he will have achieved nothing by proceeding with the claim".

27. I see the force of these observations. In particular I agree that it behoves a claimant who receives an offer of amends to decide promptly whether or not to accept it. Sometimes that may be a difficult decision. If there is genuine uncertainty as to whether special damage has been suffered, the claimant must without delay investigate the position insofar as he is able to do. In a suitable case application may be made for pre-action disclosure. What I do not think a claimant should do is what was done in the present case: advance a claim for general damages only and decline to accept an offer of amends until the defendant had disclosed documents which might (or might not) enable a claim for special damages to be mounted.

28. Having said that the question which I have ultimately to decide is whether the time has come in the present case where it is no longer open to the Claimant to accept the Defendant's offer on its own terms (i.e. general damages only). In answering this question I bear in mind that the Claimant throughout made it clear its wish in principle to accept the offer. In effect what the Claimant wanted was the ability to make an informed decision. There is no question of any bad faith on the part of the Claimant. I think I am entitled to bear in mind also the consequences of my deciding that it is no longer open to the Claimant to accept the offer: almost certainly the Claimant would face an irresistible section 4 defence with the result that no damages would be recovered. That outcome strikes me as unjust.

29. In these circumstances I think Mr Parkes was entitled belatedly to accept the offer of amends on behalf of his client.

30. I deal finally with the application for further information. The further information sought is in my view relevant only to a claim for special damages. The offer of amends was predicated upon the claim being limited to general damages. If follows that the Claimant is not entitled to the further information sought.