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Case No: HQ06X03905

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2007

Before :

THE HONOURABLE MR JUSTICE GRAY

- -

Between :

Frank Warren	**Claimant**
- and -	
The Random House Group Ltd	**Defendant**

- -
- -

Adrienne Page QC and William Bennett (instructed by **Carter-Ruck Solicitors**) for the **Claimant**
Desmond Browne QC and Matthew Nicklin (instructed by **Simons Muirhead & Burton Solicitors**) for the **Defendant**

Hearing dates: 20th, 21st and 22nd November 2007

- -

Approved Judgment (I)

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.

.....

THE HONOURABLE MR JUSTICE GRAY

Mr Justice Gray:

The application

1. This is the first of two interlocutory applications in a libel action brought by Mr Frank Warren as Claimant against The Random House Group Limited as Defendant in respect of passages in a book entitled "Ricky Hatton: The Hitman, My Story" published by the defendant. The application is made by the defendant for permission to amend the Defence. It raises questions as to the scope and effect of the offer of amends provisions introduced by the Defamation Act, 1996 ("the 1996 Act").

The claim in the action

2. Mr Warren, the well-known boxing promoter, complains of selected passages in the book which is an autobiographical account of the career of the boxer, Ricky Hatton. Of the three passages complained of the second and third concern respectively a boxing match between Mr Hatton and another boxer named Vilches ("the Vilches allegation") and another passage which on Mr Warren's case is about lies he is alleged to have told in public about Mr Hatton ("the lying allegation"). Nothing turns on those passages for the purposes of the present application.

3. The first passage from the book which is the subject of complaint by Mr Warren relates to a third boxer named Vince Phillips. I shall call it "the Phillips allegation". That is the passage with which the present application is concerned. The defamatory meaning attributed to this passage in the Particulars of Claim is this:

> "In their natural and ordinary meaning the words complained of above meant and were understood to mean that the Claimant had dishonestly conned the boxer Vince Phillips into accepting a pitiful fee for putting his life at risk by fighting Ricky Hatton by lying to him that this was all that could be paid because American TV did not want to televise the fight".

The existing defence

4. The Defence as it stands at present includes pleas of justification to the second and third passages only. In accordance with the established practice, the Defence sets out the defamatory meanings which the defendant will seek to justify in respect of those passages together with supporting particulars of justification.

5. However, in respect of the Phillips allegation no plea of justification is advanced. Instead at paragraph 6 of the existing Defence reliance is placed on an offer of amends which has been made by the defendant. It reads as follows:

> "In so far as the words complained of in paragraph 4 of the particulars of claim meant and were understood to mean the meaning pleaded in paragraph 5 of the particulars of claim then the defendant has made an offer of amends pursuant to s.2 Defamation Act 1996 in relation to this meaning, which has not been withdrawn by the defendant and which, at the date hereof, has not been accepted by the claimant.

> **Particulars**
>
> 6.1 An offer of amends, pursuant to ss.2(2) to 2(4) Defamation Act 1996, was made by letter dated 7th March 2007 in respect of the meaning in paragraph 5 of the Particulars of Claim.
>
> 6.2 The offer of amends has not been withdrawn by the defendant and is relied upon pursuant to s.4(2) Defamation Act 1996.
>
> 6.3 At the date hereof, the claimant has not accepted the offer of amends …".

6. There follow in sub-paragraph 6.4 detailed particulars of the matters which, in the event that the claimant accepts the offer of amends, the defendant says it intends to rely on in mitigation or extinction of any compensation payable to the claimant. Those matters include the particulars relied on by way of justification of the Vilches allegation and the lying allegation as well as particulars bearing on the Phillips allegation. The latter are said to be the contextual background against which the Phillips allegation came to be published. In paragraph 6.6 of the Particulars it is pleaded that, in the event that the claimant rejects the offer of amends, the defendant will rely upon its offer of amends as a defence in relation to the meaning pleaded in paragraph 5 of the Particulars of Claim. In the event the claimant did not reject the offer but accepted it in his Reply.

7. I should explain that particulars such as those pleaded in paragraph 6 of the defence are generally known as "*Burstein*" particulars. These are particulars of circumstances surrounding the publication of allegedly libellous material which are admissible in mitigation or reduction of damages by virtue of the decision of the Court of Appeal in *Burstein v Times Newspapers Ltd* [2001] 1WLR 579.

The proposed amendment

8. The amendment for which the defendant now seeks permission is to substitute for the reliance hitherto placed on its offer of amends a plea of justification in respect of the Phillips allegation. The meaning which the defendant pleads at paragraph 5(3) of the proposed Amended Defence it will seek to justify at trial is that the claimant "dishonestly conned and/or exploited (or was responsible for the dishonest conning and/or exploitation of) Vince Phillips by trying to avoid paying him a fair and/or proper fee for his fight against Ricky Hatton".

9. The defendant further seeks permission to amend the existing Defence to delete in its entirety paragraph 6 which I have quoted earlier and which includes the so-called *Burstein* particulars. (Permission is also sought for a number of amendments to the Particulars of Justification relating to the Vilches allegation and the lying allegation. Time has not permitted these aspects of the defendant's application to be dealt with at the hearing before me).

The issue of principle which arises

10. The issue of principle which arises on this application is whether and, if so, in what circumstances it is open to a defendant in a libel action, whose offer of amends in respect of a defamatory imputation has been accepted by the claimant, to withdraw that offer of amends and in its place to advance a plea of justification in respect of that imputation.

Sections 2 to 4 of the Defamation Act 1996

11. The resolution of that issue turns largely on the provisions contained in sections 2 to 4 inclusive of the Defamation Act, 1996. So far as material, they provide as follows:

> "Offer to make amends
>
> 2(1) A person who has published a statement alleged to be defamatory of another may offer to make amends under this section.
>
> (2) The offer may be in relation to the statement generally or in relation to a specific defamatory meaning which the person making the offer accepts that the statement conveys ("a qualified offer").
>
> (3) An offer to make amends
>
> must be in writing,
>
> must be expressed to be an offer to make amends under section 2 of the Defamation Act 1996, and
>
> must state whether it is a qualified offer and, if so, set out the defamatory meaning in relation to which it is made.
>
> (4) An offer to make amends under this section is an offer
>
> (a) to make a suitable correction of the statement complained of and a sufficient apology to the aggrieved party,
>
> (b) …
>
> (c) …
>
> …
>
> (5) An offer to make amends under this section may not be made by a person after serving a defence in defamation proceedings brought against him by the aggrieved party in respect of the publication in question.

(6) An offer to make amends under this section may be withdrawn before it is accepted; and the renewal of an offer which has been withdrawn shall be treated as a new offer.

Accepting an offer to make amends

3(1) If an offer to make amends under section 2 is accepted by the aggrieved party, the following provisions apply.

(2) The party accepting the offer may not bring or continue defamation proceedings in respect of the publication concerned against the person making the offer, but he is entitled to enforce the offer to make amends, as follows.

(3) …

(4) …

(5) If the parties do not agree on the amount to be paid by way of compensation, it shall be determined by the court on the same principles as damages in defamation proceedings.

The court shall take account of any steps taken in fulfilment of the offer and (so far as not agreed between the parties) of the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was reasonable in the circumstances, and may reduce or increase the amount of compensation accordingly.

(6) If the parties do not agree on the amount to be paid by way of costs, it should be determined by the court on the same principles as costs awarded in court proceedings.

(7) …

(8) …

(9) …

(10) …

Failure to accept offer to make amends

4(1) If an offer to make amends under section 2, duly made and not withdrawn, is not accepted by the aggrieved party, the following provisions apply.

(2) The fact that the offer was made is a defence (subject to subsection (3)) to defamation proceedings in respect of the publication in question by that party against the person making the offer.

> (3) …
>
> (4) The person who made the offer need not rely on it by way of defence, but if he does he may not rely on any other defence.
>
> If the offer was a qualified offer, this applies only in respect of the meaning to which the offer related".

The argument for the Defendant

12. Mr Desmond Browne QC, seeking permission to amend on behalf of the defendant, submits that, whilst it may appear substantial, the amendment to plead justification in relation to the passage in the book concerning Mr Vince Phillips in reality does no more than "convert" the offer of amends into a plea of justification. Its effect is to bring the contents of that part of the Defence into line with a letter dated 18 March 2003 written by Mr Russell Sauer and not a witness statement dated 1st November 2007 which has now been obtained from him Mr Sauer, who is a partner in a US law firm which acted for Mr Phillips in connection with negotiations for his participation in the fight with Mr Hatton. Mr Browne maintains that with the additional evidence contained in Mr Sauer's witness statement, the defendant was enabled to deploy the *Burstein* particulars in conjunction with the evidence of Mr Sauer to advance a plea of justification to the meaning asserted in paragraph 5(3) of the Amended Defence. I will return to that letter later in this judgment.

The language of the offer of amends provisions in the Defamation Act, 1996

13. In support of his contention that the defendant should be permitted to amend the defence to substitute for the existing defence founded on the accepted offer of amends a plea of justification, Mr Browne points out that, although the three passages of which Mr Warren complains in these proceedings are separately pleaded in paragraphs 4, 6 and 8 of the Particulars of Claim, they do not give rise to separate causes of action. Moreover he submits that it is the practice of the English courts in defamation actions to favour a single award of damages, even where there is more than one cause of action: see *Hayward v Thompson* [1982] 1 QB 47. In that case the claimant received a single award of damages for libellous articles appearing in *The Sunday Telegraph* on two successive Sundays. Mr Browne contends that, if the publication of a book containing several defamatory imputations about the claimant is not to be treated as giving rise to a single cause of action, then section 5 of the Defamation Act, 1952 would be otiose. Section 5 provides in effect that, where the publication complained of contains several defamatory imputations against the claimant, a defence of justification may not fail just because one of the charges is not proved to be true.

14. Mr Browne's argument is that the language of the material provisions of the 1996 Act – and in particular the language of section 2(2) – should be construed as catering only for the situation where the defendant accepts that his statement is defamatory and false but disputes that the statement bears so high a defamatory meaning as the claimant contends: see by way of example the various levels of defamatory meaning identified in, amongst other cases, *Chase v News Group Newspapers* [2003] EMLR 11.

15. Accordingly the offer made by the defendant in the present case was not, according to the defendant's argument, "a qualified offer" as defined in section 2(2) of the 1996 Act, since it was not made "in relation to a specific defamatory meaning which the person making the offer accepts that the statement [alleged to be defamatory of another] conveys". It was not an offer to make amends for the publication of a defamatory *meaning* lower than that contended for by the claimant but rather an offer to make amends for a statement forming part, but not all, of "the publication concerned". Mr Browne described it as a "partial" offer (although that is not a term which is to be found in the 1996 Act).

16. Mr Browne further points to the fact that the provisions of the relevant parts of the 1996 Act dealing with qualified offers of amends speak throughout of "the meaning to which the offer related", rather than to "the statement to which the offer related": see sections 4(2) and 4(4). Reliance is also placed on section 3(2) which prevents the party who has accepted an offer of amends from bringing or continuing defamation proceedings "in respect of the publication concerned". This is not said to be a case where the claimant's acceptance of the offer of amends prevents the claimant from continuing the proceedings in respect of the other passages in the book.

The rights of the defendant under the European Convention of Human Rights (ECHR)

17. If I were to reject the construction of sections 2 to 4 of the 1996 Act for which the defendant contends, the next and alternative argument advanced by Mr Browne is that a construction of those provisions which disables a defendant in a libel action whose offer of amends has been accepted from defending itself against a claim for damages for libel, irrespective of what has happened since the offer was made and accepted, would be an unwarranted interference with the Article 10 rights of that defendant. By the same token such a defendant would be deprived of his rights under Article 6 of the ECHR by reason of his being prevented from putting forward a defence of justification: see *De Haes & Gijsels v Belgium* [1997] 25 EHRR 1 at para 50, 58.

18. It is submitted that the court is obliged, by virtue of section 3 of the Human Rights Act 1998, to construe primary legislation in a way which is compatible with the Convention rights of the parties. Moreover, since the Court is a public authority, it would be unlawful for it to act in a way incompatible with Convention rights: see section 6(1) of the 1998 Act. Furthermore section 12(4) of the 1998 Act requires the court to:

> "… have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court to be journalistic literary or artistic material (or conduct connected with such material), to
>
> a. the extent to which
>
> i. the material has or is about to, become available to the public; or
>
> ii. it is, or would be, in the public interest for the material to be published…".

19. The defendant argues that it is incumbent on the Court to "read down" sections 2 to 4 of the 1996 Act so as to ensure compatibility with its Article 10 rights: see *R v A* [2002] 1 AC 45 per Lord Steyn at para 44. Accordingly, submits Mr Browne, the duty of the Court in the present case is to construe the material provisions of the 1996 Act so as to permit a defendant to abandon reliance upon an offer of amends in favour of an alternative substantive defence. If necessary this could be achieved by reading into section 3(2) of the 1996 Act the following opening words: "unless the party making the offer abandons reliance upon it…". In this way the offer of amends provisions of the 1996 Act become Convention compliant.

The argument for the Claimant opposing the application for permission to amend

20. The essence of the objection advanced by Miss Adrienne Page QC to the proposed amendment is that to permit a party to resile from his offer of amends in order to re-open liability and plead justification after that offer has been accepted would be to defeat Parliament's intention and to wreck the statutory scheme.

21. Miss Page points out that the letter making the offer of amends made clear by its terms that it related solely to the publication complained of in paragraph 4 of the Particulars of Claim (the Phillips allegation) and the meaning attributed to it in paragraph 5 of the Particulars of Claim. The offer was in due course accepted by the claimant in his Reply. There followed an order of Master Turner, made by consent, that permission be given to read a Statement in Open Court in relation to the Phillips allegation. The Statement included an express acceptance on behalf of the defendant that the allegation that the claimant misled Mr Phillips about the sale of the television rights in relation to his fight against Mr Hatton was untrue. An apology was made in open court to the claimant by counsel on behalf of the defendant for the inclusion of that allegation in the defendant's book. The statement in open court was made on 4th October 2007.

22. Such being the history of that part of the proceedings which related to the Phillips allegation, Miss Page argues that on the proper construction of sections 2 to 4 of the 1996 Act the defendant is debarred from re-opening the issue of liability in relation to that passage of the book. All that remains is the entitlement of the claimant pursuant to section 3(2) of the 1996 Act to enforce, if he so wishes, the offer of amends which has been accepted on his behalf and partly performed. Whether the claimant is entitled to statutory compensation and, if so, what compensation will be determined at a hearing which it has been agreed between the parties should take place after the trial of the claimant's claim in respect of the second and third passages in the book of which he has complained.

23. The claimant's analysis of the machinery laid down in sections 2 to 4 of the 1996 Act for the making and consequences of an offer of amends is as follows: a defendant's offer of amends may take the form of an unqualified offer not to contest liability in return for the claimant's agreement to abide by the statutory machinery which governs the disposal of the remaining issues between the parties: see section 3(2) to (6) and (10). Alternatively it is open to the defendant to make a qualified offer, that is, an offer not to contest liability in relation to the statement complained of, save only in relation to the meaning of the words complained of, in return for the claimant's agreement to abide by the same statutory machinery.

24. Miss Page submits that there is no reason why, in the event that the defendant accepts the offer (qualified or unqualified), the Court should not enforce the agreement. It is no different, she argues, from an agreement to submit to arbitration. Absent the existence of grounds on which the defendant can rescind the agreement on ordinary contractual principles, the defendant should be held to his agreement. What a defendant cannot do, once the claimant has accepted his offer of amends, is resile from his concession on liability. If, as here, the offer was unqualified as to meaning, the Court will proceed on the basis of the claimant's pleaded meaning. In this connection reliance is placed on two decisions of Eady J, namely *Abu v MGN Ltd* [2003] 1 WLR 2201 at 2205-6 and *Nail v News Group Newspapers* [2004] EMLR 19.

The claimant's response to the defendant's argument based on the ECHR

25. In relation to the Defendant's contention that the construction of the 1996 Act for which the claimant contends would constitute an unwarranted interference with the defendant's rights under Articles 10 and 6 of the ECHR, Miss Page emphasises that the defendant voluntarily submitted to the statutory regime contained in sections 2 to 4, presumably after considering the available evidence, making whatever investigations were thought to be appropriate and having regard to its position generally.

26. Like the CPR, the offer of amends provisions in the 1996 Act were, it is submitted, enacted in order to encourage parties to defamation litigation to settle their disputes early and cheaply. Far from interfering with the Article 10 rights of media defendants, the legislation provided defendants with a new defence if the offer of amends was not accepted by the aggrieved party (see section 4(2)), subject only to the provision contained in section 4(3) of the 1996 Act. Not only was a new defence introduced by the 1996 Act, its provisions had the effect (and were intended to have the effect) of significantly discounting the level of compensation payable under the statutory scheme as against the level of an award at trial: see *Nail v News Group Newspapaers* [2005] EMLR at para 19.

27. Moreover, submits Miss Page, the defendant's reliance on Article 10 in the circumstances of the present case is exaggerated. She points out that the defendant marketed and sold the book containing the Phillips allegation over a period of some 5 ½ months (including the critical Christmas period in 2006). 37,000 copies of the book were sold, most of them taking place after complaint was made by the Claimant. It is accepted that the book was recalled and remaining copies were pulped but this was the voluntary decision of the defendant, which no doubt judged that, in respect of the Phillips allegation, it was preferable to take advantage of the offer of amends process, including the discounted level of compensation, rather than to continue to exercise its Article 10 rights by seeking to achieve further sales. There is in any case nothing about the offer of amends procedure which restricts the defendant from re-publishing the Phillips allegation in the future.

28. Finally in relation to Article 10, the claimant points out that the right conferred by Article 10 is a qualified right: the court has to perform a balancing operation between the publisher's rights under that Article and the rights of a complainant under Article 8.

29. As to the reliance placed on behalf of the defendant on Article 6 of the ECHR, the claimant accepts that, by making an offer of amends, a defendant forgoes its right to contest the claim made against it at trial. But the decision to make the offer is one which is made voluntarily, unequivocally and (at least in the present case) with the advantage of skilled and specialist legal advice. Miss Page submits that this constitutes a waiver of the defendant's Article 6 rights: see *Stretford v The Football Association Limited* [2007] EWCA 238 and *Millar v Procurator Fiscal, Elgin* [2001] UKPC 4. It is open to a defendant who has made an offer of amends to withdraw it before it is accepted (see section 2(6) of the 1996 Act), just as an offer under CPR Part 36 can be withdrawn (see *Scammell v Dicker* [2001] 1 WLR 632 at para 19).

30. Not only has the offer of amends been made in the present case, it has also been accepted and the parties' agreement has been partly performed by the reading of the statement in open court in terms sanctioned by the Order of the Master. It is submitted that in these circumstances the matter is *res judicata* or at least the defendant is now estopped from contesting the issue of liability in respect of the publication of the Phillips allegation. There is nothing unfair about a statutory decision which debars a party to litigation from resiling from a decision to compromise a claim.

31. As to the defendant's contention that its "conversion" of the offer of amends into a plea of justification can be explained and justified by the late disclosure of Mr Sauer's letter of 18 March 2003 (see paragraph 12 above), Miss Page points out, firstly, that the offer of amends was made before either party came under any disclosure obligation. She adds that in point of fact the letter was disclosed by the claimant on 2 August 2007, that is, before the wording of the statement in open court was agreed by the parties in mid-August 2007 and before the statement was read on 4 October 2007. Moreover there is nothing in Mr Sauer's letter of 18 March (or in his subsequent witness statement of 1 November 2007) which supported the charge that the claimant lied to Mr Sauer about the television rights.

32. In all the circumstances Miss Page submits that the defendant chose voluntarily and advisedly to avail itself of the provisions of sections 2-4 of the 1996 Act; the intention underlying those provisions and their effect is clear and the defendant should not be permitted now to resile from its choice by amending to plead justification.

Conclusion as to the construction of the offer of amends provisions of the 1996 Act

33. Section 4 of the Defamation Act 1952 provided that a defendant in a libel action might make an offer of amends which, if accepted and duly performed, precluded the bringing of any proceedings for defamation and terminated any proceedings that were on foot. Section 4 proved to be cumbersome in operation and was rarely, if ever, used. So it was that in 2000 that section was repealed and replaced by the more extensive provisions of sections 2 to 4 of the 1996 Act.

34. Those provisions in the 1996 Act followed the report of the Neill Committee which concluded that it seemed:

> "…desirable to have some more streamlined defence available (rather than merely the opportunity of mitigating damages) in circumstances where a defendant has behaved fairly and

> reasonably after the tort has been committed. Putting it bluntly, there is a need to discourage that small minority of plaintiffs who wished to proceed to trial from purely financial motives, rather than being motivated by desire for vindication, especially in circumstances where the defendant is conceived to be 'over a barrel'".

35. In *Nail v Newsgroup Newspapers (op cit)* Eady J described the offer of amends regime as being one which:

> "…provides, as it was supposed to, a process of conciliation. It is fundamentally important that when an offer has been made, and accepted, any claimant knows from that point on that he has effectively "won". He is to receive compensation and an apology or correction. In any proceedings which have to take place to resolve outstanding issues, there is unlikely to be any attack upon his character. The very adoption of the procedure has therefore a major deflationary effect upon the appropriate level of compensation. This is for two reasons. From the defendant's perspective he is behaving reasonably. He puts his hands up, and accepts that he has to make amends for his wrong doing. As to the claimant, the stress of litigation has from that moment at least been significantly reduced.
>
> Whereas juries used to compensate for the impact of the libel "down to the moment of verdict", once an offer of amends has been accepted the impact of the libel upon the claimant's feelings will have greatly diminished and, as soon as the apology is published, it is also hoped that reputation will be to a large extent restored. It is naturally true that if a defendant or his lawyers thereafter should behave irresponsibly, or try to drag in material to "justify by the back door" that will be an aggravating factor. On the whole, however, once the defendant has decided to go down this route, it would make sense to adopt a conciliatory approach and work towards genuine compromise over matters such as the terms of an apology or the level of compensation.
>
> …
>
> One of the reasons for the Neill Committee's recommendations of this new offer of amends procedure, back in July 1991, was to give media and other defendants a possible exit route when they face the uncertainty and arbitrariness of jury awards in that area".

36. Those passages were cited with approval by the Court of Appeal: [2005] EMLR 12 at paragraph 19.

37. The provenance of the offer of amends provisions in the 1996 Act appear to me to shed valuable light on the purposes underlying them and the objectives which it was

hoped might be achieved by introducing a streamlined procedure. Those objectives include the provision of an exit route for a defendant who is unwilling or unable to advance a substantive defence in respect of the whole or a part of the claim against him and the opportunity for a claimant to achieve an economical and rapid resolution of his complaint or part of it.

38. I turn now to the wording of sections 2 to 4 of the 1996 Act. I will deal separately and later with the effect on the statutory provisions of the parties' respective rights under the ECHR.

39. In cases where a defendant makes a non-qualified offer of amends, no problems arise. However, section 2(2) provides that the offer of amends may be a qualified one. This is an offer made "in relation to a specific defamatory meaning which the person making the offer accepts that the statement conveys". Neither in this sub-section nor in sub-section 2(1) is there any reference to the publication containing the statement alleged to be defamatory. Section 2(3) provides that the offer of amends must state whether it is a qualified offer and, if so, must set out the defamatory meaning in relation to which it is made. The offer in the present case was dated 7 March 2007. It described itself as "Offer of Amends". It did not say that the offer was a qualified offer and it complied with those requirements: the offer letter identified the statement to which the offer related and stated clearly that the meaning which was the subject of the offer was the meaning pleaded in paragraph 5 of the particulars of claim.

40. The provision in the 1996 Act which is the foundation for the construction of the offer of amends provisions for which the defendant contends is section 3(2). This sub-section provides that the party accepting the offer may not thereafter bring or continue defamation proceedings "in respect of the publication concerned" against the person making the offer. The contention of Mr Browne for the defendant is that this provision must mean that the offer, whether qualified or not, must also relate to the publication as a whole. He submitted that, given that the section used the word "publication", the submission of the claimant that it was section 3(2) which debarred him from proceeding with the claim was unsustainable. Mr Browne also prays in aid section 4(2) and (4) but those two sub-sections do not seem to me to add anything to the point which Mr Browne makes in reliance on section 3(2).

41. Mr Browne's argument is that, because a publication such as a book may contain several separate defamatory imputations, it still gives rise to a single cause of action. Accordingly, he submits, section 2(2) cannot be read as entitling a defendant to select a particular passage (or statement) from a publication such as a book and to make a qualified offer of amends in respect of that passage (or statement) only. This is because section 3(2) debars the party accepting the offer from bringing or continuing defamation proceedings in respect of the publication as a whole. The defendant's argument is that the draftsman cannot be taken to have intended that a defendant would be able by virtue of section 3(2) to escape scot-free from the consequences of his having published other defamatory passages (or statements) which were not the subject of the defendant's qualified offer of amends. In these circumstances it is contended that section 2(2) must be read as entitling a defendant to make an unqualified offer of amends in relation to the publication as a whole or to make a qualified offer in relation to what will invariably be a lower level of defamatory meaning than that for which the claimant is contending. What it is submitted the defendant cannot do is to make an offer of amends in respect of part of a publication.

42. It seems to me that there is a short answer to this argument advanced on behalf of the defendant. It is that section 3(2) does not refer to "the publication" *simpliciter* but rather to "the publication concerned" (emphasis added). That is evidently a reference back to section 2(1) where one finds the words "A person who has published a statement alleged to be defamatory of another may make an offer of amends under this section". I see no reason to construe the words in section 2(1) as embracing the publication (in its technical sense) as a whole. The reference in section 2(2) should in my judgment be construed in the same way, that is, as applying to a particular statement published rather than to the whole publication. It is noteworthy that neither in section 2(1) nor in section 2(2) does one find any reference to "the publication". The effect of section 2(2), so read, is that a defendant may make a qualified offer either by selecting a particular statement from a publication as the subject of his offer or by selecting a particular defamatory meaning lower than that contended for by the claimant.

43. It follows from this analysis of the wording of the offer of amends provisions that the consequence of a claimant accepting an offer of amends is that he has a statutory entitlement to enforce the offer in respect of the selected statement alone and without foregoing his right to bring or continue defamation proceedings in respect of such other defamatory passages as may be found in the publication.

44. This reading of the relevant provisions appears to me to accord with both common sense and with the underlying purpose of the provisions. It is not uncommon for a defendant in a libel action to want to extricate himself from the consequences of having included in his publication words which he cannot defend. In the same way a defendant may wish to offer amends on the basis that the words complained of are defamatory but bear a meaning lower than that attributed to them by the claimant. I can see no rhyme or reason why the draftsman of the 1996 Act should have intended to permit a defendant to make a qualified offer of amends in respect of a lesser meaning of the words complained of, whilst denying the same opportunity to a defendant who wishes to make a qualified offer of amends in respect of a particular defamatory statement which forms part of the wider publication. The manifest purpose underlying sections 2 to 4 of the 1996 Act was to cater for both situations.

45. The defendant's construction of these provisions is built upon the proposition that a publication gives rise to a single cause of action no matter how many defamatory imputations it contains. But the offer of amends provisions in the 1996 Act made no mention of the somewhat technical concept of multiple causes of action contained within a single publication. I do not accept that reference to that concept assists in arriving at the true construction of the sections in question. Nor in my judgment is the construction for which the defendant contends assisted by reference to the discretionary practice of the court to direct a jury to make a single award of damages in respect of more than one publication: see *Hayward v Thompson* [1982] 1 QB 47 at 62B to C, 70D to G, 73H to 74F.

46. For the above reasons I reject the construction of section 2 to 4 of the 1996 Act for which the defendant contends. In my judgment it is open to a defendant to make a qualified offer of amends in respect of a particular statement contained in a publication which, if accepted by the claimant, will bring into play the machinery provided for in section 3 of the Act.

The effect of Convention rights on the construction of the 1996 Act

47. As I have said, the defendant contends that even if the language of sections 2 to 4 of the 1996 Act permits a defendant to make a qualified offer of amends in respect of a particular defamatory statement contained in a wider publication, the combined effect of the Convention rights which are engaged is to require the court to adopt the construction of the offer of amends provisions for which the defendant contends in this case.

48. It is common ground that the Convention rights which are or may be engaged here are Article 6 (the right to a fair trial, which includes the requirement that each party be afforded a reasonable opportunity to present his case); Article 8 (the right to respect of private and family life) and Article 10 (the freedom to impart and receive information). It is to be noted that both Articles 8 and 10 are qualified rights.

49. I accept the contention of the defendant that I am required by the combined effect of sections 3(1) and 6(1) of the Human Rights Act 1998 to read and give effect to the primary legislation contained in sections 2 to 4 of the 1996 Act in a way which is compatible with Convention rights and that it would be unlawful for the court to act in a way which is incompatible with a Convention right. I further accept that by virtue of section 12(4) of the 1998 Act I must in the circumstances of the present case have particular regard to the Convention right to freedom of expression. I am prepared for the purposes of this ruling to assume that the material with which these proceedings are concerned is journalistic or literary material. Accordingly I should also have particular regard to the extent to which it is or would be in the public interest for the material to be published.

50. I acknowledge that, as Lord Steyn explained in *R v A* [2002] AC 45 at paragraphs 44 to 45, the interpretative obligation under section 3 of the 1998 Act is a strong one. It applies even if there no ambiguity in the language in the sense of the language being capable of two different meanings. It will sometimes be necessary to adopt an interpretation which linguistically appears strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions.

51. The question which I have to decide is whether the effect of the construction of sections 2 to 4 of the 1996 Act for which the claimant contends constitutes an interference with the rights of the defendant under Articles 10 and or 6 of the Convention. I will take those two Articles separately, starting with Article 10.

52. The way in which it is said that the defendant's Article 10 rights are interfered with is that, once an offer of amends is accepted, a defendant is disabled from defending itself against the libel claim in relation to which the offer of amends has been made, no matter what has happened since the offer was made. Once the offer is accepted, the defendant says its hands are tied: it cannot advance a defence of justification or any other substantive defence and it is severely constrained as to the matters which it can adduce at the statutory compensation hearing in mitigation of damages. Mr Browne says that his client finds itself in a legislative cul-de-sac from which there is no escape.

53. I accept that, once an offer of amends is accepted by the claimant, the ability of the defendant to defend itself is heavily circumscribed. I do not, however, accept that this entails an unjustifiable interference with the Article 10 rights of the defendant. Nor do I see any reason why sections 2 to 4 of the 1996 Act should be "read down" so as to import into the statutory machinery an entitlement on the part of a defendant whose offer of amends has been accepted to resile from his offer and plead a substantive defence.

54. In my opinion it is necessary to stand back and to bear in mind the objectives underlying the offer of amends provisions in the 1996 Act. As I have observed, sections 2 to 4 were enacted to replace section 4 of the 1952 Defamation Act which had proved unworkable. Sections 2 to 4 of the 1996 Act provide defendants with a new and workable defence to defamation claims. Those provisions enable a defendant, if it so chooses, to avail itself of an exit route from potentially expensive litigation and at the same time enable the defendant to pay significantly discounted damages for the libel to which the offer of amends relates: see *Abu v MGN Limited* [2003] 1 WLR 2201 at paragraphs 4 - 10 and *Nail v Newsgroup Newspapers* (*op cit*) at paragraph 41. Sensibly viewed, it appears to me that sections 2 to 4 of the 1996 Act promote rather than interfere with the Article 10 rights of media and other defendants.

55. Three further points need to be made. The first is that it is the defendant and the defendant alone who can elect to set in motion the offer of amends machinery by making an offer. True it is that the defendant is bound by the provisions of section 3 in the event that his offer of amends is accepted. But the same is true of any defendant whose offer to settle an action is accepted by the opposing party.

56. The second point is that the right to freedom of expression under Article 10 of the Convention is a qualified right, which means that the exercise of that right may be subject to such restrictions as are provided by law and are necessary in a democratic society for the protection of the reputation or rights of others. In my judgment to the extent that sections 2 to 4 of the 1996 Act restrict the right of a defendant under Article 10, the pressing social need for such provisions, including the need to protect the Article 8 rights of the claimant is convincingly established. Many defamation claimants need an expeditious and economical way of achieving vindication. I see nothing disproportionate about the legislation in this regard.

57. The third and last point to be made is that the offer of amends in this case came as long ago as 7 March 2007 at a time when the defendant, which is itself a substantial publishing house, was receiving advice from specialist solicitors and counsel. It is apparent that the decision to pursue the offer of amends route in relation to the Phillips allegation was a considered one. The offer has been accepted by the claimant. As a result a binding and legally enforceable contract came into being. That contract has been partly performed by the making of an agreed statement in open court which was sanctioned by the court. It is not in my view open to the defendant in the light of that history to resile from its offer of amends.

58. For the above reasons I reject the argument that the offer of amends provisions in the 1996 Act constitute an interference with the Article 10 rights of this defendant. I reject the defendant's invitation to "read down" those provisions, since in my view they are compliant with Article 10. I also reject the submission on behalf of the

defendant that there should be read into the opening of section 3(2) of the 1996 Act the words: "unless the party making the offer abandons reliance upon it…". The importation of such a clause contradicts the letter and spirit of the legislation. It is revealing that the defendant felt itself constrained to make this submission.

59. The defendant relies also on Article 6 of the Convention. I accept, in the light of *de Haes and Gijsels v Belgium* (*op cit*) that Article 6 embraces the principle of equality of arms, which requires that each party must be offered a reasonable opportunity to present its case under conditions that do not place him at a substantial disadvantage vis á vis his opponent. As I have already indicated, I further acknowledge that the effect of sections 2 to 4 of the 1996 Act is that, once a defendant has chosen to make an offer of amends and that offer has been accepted, the effect of the Act is that the defendant is bound by the resulting agreement and may not thereafter set up a substantive defence (just as the claimant may not bring or continue proceedings in respect of the publication concerned).

60. None of these considerations appears to me to give rise to an interference with the Article 6 rights of the defendant. In the first place, as Eady J pointed out in *Nail v Newsgroup Newspapers* (*op cit*) at paragraph 26, the defendant had the option of either defending the libel action or invoking the statutory offer of amends machinery. Accordingly the defendant had a reasonable opportunity to present a defence. Having evidently considered its position and taken legal advice, the defendant elected voluntarily to make an offer of amends. I see no interference with the Article 6 rights of the defendant, any more than there could be said to be an interference with the Article 6 rights of a defendant who chooses to settle an action outwith the offer of amends provisions and who is subsequently held to his agreement.

61. Moreover I am satisfied that, by making its offer of amends, the defendant unequivocally and voluntarily waived its Article 6 rights of access to the court. It is clear from the Strasbourg jurisprudence that a party may be treated as having waived its Article 6 rights (see for example *Deweer v Belguim* [1980] 2 HER 439; *R v Switzerland* (No 1197/61) as well as domestic authorities (see *Del Placito v Slater* [2004] 1 WLR 1605 and *Stretford v Football Association Limited* [2007] EWCA Civ 238).

62. On the facts of the present case I am satisfied that the defendant had an unfettered right of access to the court. It chose to make an offer of amends with its eyes open and thereby waived its Article 6 rights thereafter. The waiver was unequivocal and voluntarily. Mr Browne, in reliance on a number of authorities gathered in "The Law of Human Rights" by Clayton and Tomlinson at pages 337-8, submitted that the defendant in the present case should not be held bound by its election to make an offer of amends because it lacked full knowledge of the consequences of so doing. I do not with respect think that it can be said of this defendant that it did not know that, if its offer of amends was accepted, it would be bound by the provisions of section 3 of the 1996 Act. I accept that at the date when the offer of amends was made the defendant did not have Mr Sauer's letter of 18 March 2007 and that Mr Sauer did not sign his witness statement until 1 November 2007. But it was open to the defendant to investigate further the circumstances under which Mr Phillip's purse was negotiated before making its offer of amends but it chose not to do so. I see no reason why the defendant should not be held to the waiver of its Article 6 rights which was implicit in its decision to make an offer of amends.

A footnote on discretion

63. At the beginning of their written submissions Mr Browne and Mr Matthew Nicklin reminded me of the general principles which govern the power conferred by CPR Part 17.3 to allow amendments to parties' statements of case. I have not hitherto referred to those principles because, as it appears to me, the real question as regards the defendant's application to withdraw its offer of amends and in substitution to plead justification falls to be determined by reference to the provisions of the 1996 Act in regards to the offer of amends procedure. That is the basis on which I have arrived at the conclusion that the application for permission to amend should be refused.

64. However, Miss Page had a fall-back position in regard to the application: her submission was that, even if it was open to the defendant as a matter of the true construction of sections 2 to 4 of the Defamation Act 1996 to make the amendments for which permission was sought, the court in the exercise of its discretion should refuse the application. For the sake of completeness, I should deal with that submission.

65. Numerous cases are referred to in the defendant's written submissions. They include *Cobbold v Greenwich LBC* (unreported CA, 9 August 1999); *McPhilemy v Times* [1999] 3 All ER 775; *Basham v Gregory* (unreported CA 21 February 1996); *MacKenzie v Business Magazines (UK Ltd* (unreported CA 18 January 1996); *McDonald's v Steel* [1995] 3 All ER 615 and *De Haes & Gijsels v Belgium* [199] 25 EHRR 1. Those are familiar authorities. I bear the principles to be derived from those cases in mind, as I do the material provisions of the Human Rights Act to which Mr Browne also referred me.

66. The essence of the case advanced by Miss Page that the court should in the exercise of its discretion refuse the proposed amendment was that a detailed examination of the chronology reveals that the decision to make the offer of amends was not made in ignorance. She drew attention to the significant amount of research which, according to the evidence, the defendant's experienced and specialist solicitors, Simons Muirhead & Burton, had carried out before the decision was taken to make the offer of amends. That research had revealed, amongst other things, that an attempt had been made to re-negotiate Mr Phillips's purse in the light of Showtime's television coverage of the bout and that this attempt had been rejected. This was pleaded in the Defence which was served five days after the offer was made. It seems that the research and investigation by the defendant's solicitors continued during the Autumn of 2006. Miss Page submits that with due diligence the defendant's representatives could have obtained the information upon which they now rely by way of justification before the offer of amends was made on 7th March 2007. The defendant's solicitors were aware at an early stage that Mr Phillips's contract for the fight against Mr Hatton was negotiated though attorneys. The identity of that attorney was disclosed to the defendant on 7th June 2007 and a partner in the defendant's firm of solicitors met Mr Sauer on 5th October 2007 (when she happened to be in Los Angeles). Thereafter a witness statement was obtained from him. The Reply, accepting the defendant's offer of amends had been served as long as ago as 18th April 2007 and the statement in open court had been read on 4th October 2007. Yet it was not until 6th November 2007, which was the morning before the hearing of an application on behalf of the claimant to strike out the *Burstein* particulars relied on in the Defence, that the

proposed amended defence "converting" the *Burstein* particulars into particulars of justification was served.

67. Such being the history, Miss Page contends that the court should as a matter of discretion refuse to permit the amendment to be made. She is highly critical of the explanation put forward at paragraph 11 of the defendant's written skeleton argument as to the reason for the delay in submitting the amended statement of case.

68. What the defendant says happened in the present case is that on 2 August 2007 (that is, some months after the offer of amends had been accepted by the claimant in the Reply served on 18 April 2007), the claimant belatedly disclosed a letter dated 18 March 2003 from Mr Sauer in his capacity as attorney acting for Mr Vince Phillips. The significance of that letter, according to the defendant, is that it refers to Mr Phillips's purse for the fight against Mr Hatton being negotiated on the basis of a representation that Showtime was not interested in televising the fight. The defendant maintains that this letter should have been disclosed by the claimant at a much earlier stage in the present case. Mr Sauer has subsequently provided a witness statement to the defendant dated 1 November 2007. Mr Browne contends that in his capacity as attorney for Mr Phillips, Mr Sauer appears to have been deceived when negotiating his client's purse with the claimant's company into thinking Showtime would not be televising the fight, when in fact they had already contracted to do so. For the defendant in the present case to be held to be disentitled from relying on Mr Sauer's letter (and other matters) in support of a plea of justification would infringe its Article 10 rights.

69. Mr Browne contended that, given that the claimant is already facing the *Burstein* particulars, there would be no prejudice to him if the amendment were to be allowed. He relies on the contents of the fourth witness statement of Mr Mireskandari of the Defendant's solicitors.

70. I accept of course that in principle amendments should be permitted, however late, where it is necessary to do justice between the parties. I do not, however, accept that in the circumstances which obtain in the case of the defendant is entitled to invoke that principle. For the reasons advanced by Miss Page, which I have rehearsed above, I would in any event have refused the amendment in the exercise of my discretion.

Decision

71. For the above reasons I refuse the renewed application of the defendant to amend its defence.