Neutral Citation Number: [2006] EWHC 3095 (QB)

Case No: HQ06X02755

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/12/2006

Before :

THE HON. MR JUSTICE EADY

- -

Between :

S D Marine Ltd	**Claimant**
- and -	
Craig Powell	**Defendant**

- -
- -

Jane Phillips (instructed by **Payne Marsh Stillwell**) for the Claimant
Richard Munden (instructed by **Chauncy & Co**) for the Defendant

Hearing date: 22nd November 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 EADY

The Hon. Mr Justice Eady:

1. This application is concerned with resolving a contractual dispute in the context of the offer of amends regime introduced by ss. 2-4 of the Defamation Act 1996. Its purpose was to encourage and facilitate the sensible compromise of defamation proceedings without the need for an expensive trial. There are powerful incentives to use the regime. For example, a claimant can hardly turn down a genuine offer of amends because, unless he can prove that the libel was published in bad faith, there will be a complete defence to the action: s.4(2). From a defendant's point of view, there is the attraction that any award is likely to be significantly discounted if a judge needs to determine compensation in accordance with s.3(5).

2. For the purpose of my ruling, there is no need to set out the terms of the Act, save for s.2:

> "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-
>
> (a) must be in writing,
>
> (b) must be expressed to be an offer to make amends under section 2 of the Defamation Act 1996 and
>
> (c) 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) to publish the correction and apology in a manner that is reasonable and practicable in the circumstances, and
>
> (c) to pay to the aggrieved party such compensation (if any), and such costs, as may be agreed or determined to be payable.
>
> The fact that the offer is accompanied by an offer to take specific steps does not affect the fact that an offer to make amends under this section is an offer to do all the things mentioned in paragraphs (a) to (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 a renewal of an offer which has been withdrawn shall be treated as a new offer."

3. In the present case there is a conflict as to whether this regime has been triggered by offer and acceptance or whether, on the other hand, the Defendant is free to defend the action on the basis *inter alia* of a plea of justification. If there has been acceptance of an offer, then the Claimant may enforce in accordance with s.3.

4. The litigation arises from a transaction in September 2005, whereby the Defendant Mr Craig Powell agreed to purchase a boat called *Artemis* through the Claimant broker S D Marine Ltd. Part of the arrangement was that the Claimant was to have certain work carried out which had been deemed necessary as a result of a pre-purchase survey. The Defendant found that the work had not, or so it appeared, been carried out satisfactorily and he called upon the Claimant to rectify the outstanding faults. This it was initially prepared to do but, according to the Defendant, it soon lost interest. He duly launched a claim last September in the Leeds County Court for breach of contract and/or negligence which remains unresolved. The particulars of claim were served on 18 October and the defence on 16 November 2006.

5. Meanwhile, no doubt partly from a sense of frustration, the Defendant had made postings on the subject during the morning of 23 March 2006 on the message board of the *Yachting & Boating World* website. The first of the postings was headed "S D Marine – Honest Brokers or back street cowboys?" The content quickly drew comments from other users of the website warning the Defendant that he might be sued for libel. Thus, within some 40 minutes or so of the original posting, the text was deleted and there no longer remains any record of what it actually said, although the Defendant has given in evidence an approximate summary of its contents. It seems that it recorded his unhappy experience with the boat purchase and asked whether any other people had been through similar problems with the Claimant.

6. The second posting was headed "Re: Honest Brokers or back street cowboys?" It will be noted that the direct reference to the Claimant had been removed. Nonetheless, those who had seen the original posting would naturally be able to identify to whom the second referred. Its content, which forms part of the Claimant's pleaded cause of action, is as follows:

> "The main issue is the steering was in need of adjustment and service as identified by my surveyor prior to purchase, I was assured it had been done yacht was then delivered by a delivery skipper due to it breaking down on handover day (fan belt snapped and batteries boiled and ruptured due to charging fault) On the first outing the steering was jamming which I reported, surveyor has revisited and stated unsafe to use without attention due to 1/3 turn free play, who would you deem responsible?"

7. That very day the Defendant received his first notification of the complaint by means of an e-mail timed at 13.50 from Mr Marsh, the Claimant's solicitor, and he called for the posting to be removed in its entirety on the basis that it was defamatory and false. He did not make contact with the website himself, but following notification of the complaint the Defendant did so and requested that the thread be removed. This was duly done by Mr Walker, the editor of the website. The defamatory words were therefore accessible for a relatively short period, but the evidence discloses that they may have been seen by some 200 to 300 people. The precise number cannot be ascertained, and it does not matter, but it is probably fair to say that this was not one of those internet publications which could be classified as merely technical.

8. A telephone conversation took place between the Defendant and Mr Marsh, who proposed that he publish an agreed apology on the website. The Defendant at this stage briefly and informally consulted a lawyer, to whom he had originally been introduced through the Royal Yachting Association in connection with his complaint against the Claimant about the boat. The lawyer warned him that he was not a defamation specialist but made reference to the offer of amends regime.

9. Thus armed with a "little learning", which it is well known can be a "dangerous thing", the Defendant continued to act on his own behalf in responding to the complaint from Mr Marsh. He eventually instructed lawyers on a formal basis on 4 April, which was rather too late for present purposes.

10. There is a conflict of evidence as to the content of conversations which I am unable to resolve at this stage, but that does not matter greatly since there is ample documentation on which to arrive at a determination.

11. It is now necessary to focus in a little detail on what actually passed in written form between the relevant protagonists. Mr Marsh sent a further e-mail on 23 March timed at 15.40:

> "Dear Sir
>
> We refer to your call in response to our letter. You confirmed that you had not taken legal advice as yet and that you nonetheless wanted to discuss the matter with us straight away.
>
> You opened by saying you were amazed at the content of our letter but after some discussion you accepted that you were totally wrong to say what you did and you appeared to understand the seriousness of the situation. You advised us that you had now arranged complete removal of the posting and that it did not and does not appear elsewhere. You also agreed to publish a suitable retraction and apology in terms to be agreed that we would draft for you. We enclose for your approval below a draft retraction and apology to be posted by you in your name on the same website as the offending posting and left in place for 3 days.

> This will satisfy our clients' demand for a suitable retraction and apology in relation to the posting complained of only. Our clients will still have all their other remedies.
>
> We explained that we could not assess damages at this early stage since we do not know the extent of the harm that will be caused but we can tell you our clients would prefer to see the matter resolved quickly by agreement rather than by the issue of proceedings, although whether that happens remains to be seen.
>
> We have already advised you to seek legal advice.
>
> We await hearing from you."

12. Less than an hour later, at 16.28, the Defendant responded in these terms:

> "Dear Sir
>
> Thank you for your e-mail and the draft retraction and apology statement with regard to my statement which is alleged by your client to be defamatory.
>
> In the circumstances, under Section 2 of the Defamation Act 1996 I offer to make amends in relation to the statement "S D Marine – Honest Brokers or Back Street Cowboys?" My offer to make amends under section 2 of the said act is to publish the retraction and apology in the terms drafted below which will be posted on the Yachting Monthly (*sic*) website for 3 days.
>
> 'S D Marine Limited – A Retraction and Apology
>
> This morning I posted on this site comments concerning the service I had received from SD Marine Limited. I acknowledge that my statement was not supported by evidence. Therefore, my statement was untrue and unfair. Accordingly, I fully and unequivocally retract my statement and offer SD Marine my sincere apologies.'
>
> I reserve my position with regard to my potential claim against your client for poor workmanship and to investigate others who may have also received poor service from your client".

13. This document is plainly rather confused in certain respects, and the question arises whether it can be interpreted as including an unequivocal offer of amends within the meaning of the statute. It can be noted, first, that the offer appears to have been defined as being only " … to publish the retraction and apology in the terms drafted below which will be posted on the Yachting Monthly website for 3 days". That is confusing. Furthermore, Mr Marsh himself seems to have thought it at least equivocal because he wrote in response, at 17.10, in these terms:

> "To enable us to advise our clients, we ask that you let us have your offer for damages and your confirmation that you will pay our clients' costs in this matter".

14. It is, by reason of s.2(4)(c) of the statute, inherent in any true offer of amends that the offeror is committing himself *inter alia* to pay the complainant's costs. It seems clear, therefore, that Mr Marsh was doubtful, despite the Defendant's express reference to s.2 of the Act, as to whether he truly was intending to make an unequivocal and unqualified offer in accordance with that regime.

15. Secondly, the offer was expressed to be in relation to, and (possibly) confined to, the statement "SD Marine – Honest Brokers or Back Street Cowboys?" That was the heading of the first posting. On its face, therefore, the offer would not appear to cover either the lost text of the first posting or any part of the second posting. The "statement complained of" in Mr Marsh's original letter went wider than that, and the correction offered would thus not fall within s.2(4)(a).

16. It is true, as I have already recorded, that the Defendant asked Mr Walker to remove the whole thread and not merely the heading. But I do not accept, as was urged upon me by Ms Phillips for the Claimant, that this part of the "factual matrix" demonstrates that the "offer" should be construed as extending to the whole of the second posting. Not only is that inconsistent with the express wording, but the willingness to remove the whole thread may simply be consistent with the Defendant's recognising that discretion was the better part of valour.

17. It is possible to make a "qualified" offer under the statutory scheme as contemplated by s.2(2). But this refers to a qualification in relation to "meaning". The purpose is to enable a defendant, or prospective defendant, to make clear that the offer relates to a specific meaning only (normally that would be a less serious defamatory meaning than one contended for on the complainant's behalf). That is not the position here. The offer appears to be confined simply to the first heading. That stance might be thought to be consistent, up to a point, with the Defendant's reservation of his position as to the claim for "poor workmanship". It would make sense for him to refuse any correction or apology in respect of the specific criticisms contained in the text of the second or, for that matter, the first of the postings.

18. It is to be noted that "meaning" and "statement" in this statutory context are quite distinct. The offer to retract referred to the particular "statement" contained in the heading of the first posting. The Defendant did not enter into any discussion about "meaning". In the statutory wording "statement" is used as equivalent to "words complained of" because the draftsman would have regarded the latter expression as specialist jargon. The Defendant would not, of course, have applied his mind to such matters, but I mention it in order to underline how unreal it would be to interpret what he actually said as a "qualified offer" within the meaning of the statute.

19. It is also significant that on 24 March the Defendant sent an e-mail in these terms:

> "I am not prepared to agree to your client's second draft Retraction and Apology. My draft remains on the table.

> Your draft retraction refers to statements. What statements? The fact is that I have and continue to receive a poor service from your client and I asked whether others had received a similar bad service from your client which resorted (*sic*) in legal action. I do not consider these remarks as highly defamatory as you suggest. Indeed these remarks are truthful, without malice and were made in the interest of other purchasers. I am prepared to retract and apologize for the statement 'SD Marine – Honest Brokers or Back Street Cowboys?'
>
> At present I do not intend to pay damages to your client or their costs. Does your client intend to rectify their poor workmanship and the consequences of such?"

20. He specifically enquires "what statements?" This too is consistent with his offer having been confined to one "statement" (i.e. not in the plural). He then goes on to emphasise that he maintains the truth of his remarks about "poor" or "bad" service. He also denies that those remarks were "highly defamatory". Whether he is right about that does not matter in the present context, since what is important for this construction exercise is to note that he was not intending his offer to embrace the allegations of bad service (but only the headline). In any event, a person who makes an offer of amends under the statute is not permitted to "justify by the back door": see e.g. *Nail v News Group Newspapers Ltd* [2005] EMLR 12 at [19]; *Turner v News Group Newspapers Ltd* [2006] EMLR 24 at [17]. It is not consistent with such an offer to maintain the truth of the allegations. Ms Phillips argues that I should draw a distinction between "poor workmanship" and "backstreet cowboy" and conclude that the Defendant was reaffirming only the former. I am not persuaded that there is such a bright line boundary.

21. In response to Mr Marsh's previous request for clarification on the question of costs, the Defendant states that he is not prepared "at present" to pay damages or costs. Plainly, therefore, far from reassuring Mr Marsh, this answer must have either made it clear that there was no offer in compliance with the statute or, at least, added to his confusion. As I have already said, it is inherent in a true statutory offer for the offeror to acknowledge an obligation to pay costs at some stage. Whether they can be quantified by agreement or require to be assessed by the court is neither here nor there.

22. The Defendant was not at that stage acknowledging any such obligation. He was leaving the issue of damages (if any) and costs to be the subject of further negotiation – along with rectification of "poor workmanship and the consequences". He seems to have perceived his offer of a correction (even though expressly referring to the 1996 Act) as being part of a wider negotiation aimed at resolving all outstanding issues between the parties. This shows that he did not fully understand the structure of the statutory offer of amends regime, and that is by no means surprising for a lay person.

23. More importantly, for the construction exercise, the confusion or lack of understanding would be apparent to the reasonable onlooker (such as Mr Marsh). It is obviously contradictory to be purporting to make an offer of amends while, on the

other hand, refusing to accept responsibility for costs and maintaining the truth of the libel.

24. I infer that Mr Marsh must have known that the Defendant did not intend to commit himself to a binding agreement in relation to the first posting – let alone the second. It is no answer to rely on the mantra that he had received, or been recommended to obtain, "legal advice". In fact, he appears to have had no more than an informal chat. In any case his written communications speak for themselves.

25. Notwithstanding the obvious confusion in the Defendant's mind, and indeed on the face of the correspondence, Mr Marsh three days later purported to accept what he described as "your offer to make amends under s.2 Defamation Act 1996". My own conclusion, however, is that there was no such unequivocal offer on the table which was capable of acceptance. Accordingly there was no agreement and the regime has not been triggered.

26. Another argument raised on the Defendant's behalf seemed to me to be less impressive. Reliance was placed on s.2(3)(c) for the proposition that no offer will qualify under the statute unless it is expressly stated whether it is a qualified offer. Here the Defendant did not state expressly whether the offer he was making was intended to be a qualified offer or not. He had probably never heard of the distinction. Nonetheless, it is said that the absence of any such statement would be in itself enough to demonstrate that no offer under the Act had been made.

27. Obviously, if the intention is to make a qualified offer it will be necessary to make that clear and to identify the defamatory meaning in relation to which it is made. Yet I cannot believe that Parliament intended, in every case in which an *unqualified* offer is made, that it will fail to pass muster unless it is stated (superfluously) that it is not a qualified offer. It might perhaps have been preferable to use the word "if" rather than "whether". Be that as it may, I am not persuaded s.2(3)(c) will bear the interpretation for which the Defendant contends. In the circumstances, however, this does not make any difference. I mention it only for the sake of completeness.

28. The application has been decided on the footing that, objectively judged, there had at no stage been an offer which fell within the terms of the 1996 Act.