THE COURT OF APPEAL

APPEAL NO: 2016/29

Kelly P.
Peart J.
Irvine J.
BETWEEN:

PAUL MCNAMARA

PLAINTIFF/RESPONDENT

- AND -

SUNDAY NEWSPAPERS LIMITED

- AND -

EUGENE MASTERSON

DEFENDANTS/APPELLANTS

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 11TH DAY OF MAY 2016

1. This is an appeal against an order of Binchy J. dated 12th January 2016 granting judgment to the plaintiff in default of defence on foot of a motion issued on the 25th September 2015 pursuant to the provisions of O. 27 of the Rules of the Superior Courts. This was the second such motion issued by the plaintiff, the first having come before the High Court on 13th July 2015 when by consent it was struck out following an agreement between the parties that the time for delivery of defence be extended by three weeks, with costs of the motion to the plaintiff.

2. Order 27, r. 8 (1) of the Rules of the Superior Courts provides:

> *"8(1) In all other actions than those in the preceding rules of this Order mentioned, if a defendant being bound to deliver a defence, does not do so within the time allowed, the plaintiff may, subject to the provisions of rule 9, set down the action on motion for judgment; and on the hearing of the first such application the court may give to the plaintiff such judgement as upon the statement of claim it considers the plaintiff to be entitled to, or may make such other order on such terms as the court shall think just; and on the hearing of any subsequent application, the court shall give to the plaintiff such judgment as upon the statement of claim it considers the plaintiff to be entitled to, unless the court is satisfied that special circumstances (to be recited in the order) exist which explain and justify the failure and, where it is so satisfied, the court shall make an order:-*
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> *(a) extending the time for delivery of a defence,*
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> *(b) adjourning the motion for such period as is necessary to enable a defence to be delivered within the extended time, and on such adjourned hearing:-*
>
> > *(i) if the defence has been delivered within the extended time, the court shall allow the plaintiff the cost of and in relation to the motion at such sum as it may measure in respect thereof,*
> >
> > *(ii) if a defence has not been delivered within the extended time the court shall give to the plaintiff such judgement as upon the statement of claim at considers the plaintiff to be entitled to.*
>
> *(2) In the event of the court giving judgement to the plaintiff as aforesaid, any damages to which the plaintiff may be entitled shall be ascertained by the Judge with a jury, in case any party requires and is entitled to one, but otherwise without a jury, and, if without a jury, either by the Judge or by the Master or by the Examiner, as the Judge may direct, on evidence by affidavit or otherwise"* [emphasis added]

3. It is worth drawing attention at this stage to the fact that under this rule, while the Court has an uncircumscribed discretion as to what order it may make on the first such motion, it is constrained on any subsequent such motion by the requirement that the Court shall grant judgment *"unless the court is satisfied that special circumstances (to be recited in the order) exist which explain and justify the failure."*

4. When faced with a second such motion the onus is clearly on the defendant to identify some special circumstances which not only explain the delay in delivering the defence but also justify it. The special circumstance if established must be specified in any order which the Court might make. Absent such special circumstances the Court is required to grant the plaintiff's application.

5. In these proceedings the plaintiff claims, inter alia, damages for defamation and certain related declarations arising from the publication in the Sunday World newspaper on the 21st December 2014 of certain statements and/or photographs. The details of that allegedly defamatory material do not matter for the purposes of the present appeal.

6. Having heard the plaintiff's second motion for judgment at which both parties made submissions, Binchy J. was not satisfied that the defendants had established any special circumstances which explained and justified the delay. In fact, the defendants had not even filed an affidavit in response to the motion, and therefore did not adduce any evidence which might have enabled the Court to conclude that there were any special circumstances which might explain and justify the failure to deliver a defence.

7. Nonetheless, submissions made by counsel for the defendants referred to the fact that following the service of the second motion

upon them, their solicitors had sent a letter to the plaintiff's solicitor purporting to comprise "an offer to make amends" as provided for in s. 22 of the Defamation Act, 2009, and a copy of that letter was produced to the Court. The sending of this letter of offer to make amends, albeit after the second motion for judgment had been issued and served, was submitted to constitute a special circumstance which both explained and justified the delay in the delivery of a defence since under s.22 of the Act of 2009 any such offer may not be made after the delivery of a defence.

8. A chronology of events following the publication of the material complained of is informative, and is, I believe, uncontroversial. The article and photograph was published in the Sunday World on 21st December 2014. On the following day the plaintiff's solicitors wrote to the newspaper pointing out the defamatory material and the serious damage done to the plaintiff's reputation, and called for an admission of liability and an apology. On 4th January 2015, without having made any contact with the plaintiff or his solicitor, the defendants published what purported to be an apology. However, according to the plaintiff at least, this failed to match the prominence of the material complained of, and failed to mitigate the damage caused. These proceedings were commenced on 25th February 2015, and were served along with a statement of claim on 26th February 2015. The defendants entered their appearance on 9th March 2015. Prior to the issue by the plaintiff of his first motion seeking judgment in default of defence, the plaintiff's solicitor wrote three warning letters on 30th March 2015, 30th April 2015 and on 25th May 2015 each warning that if a defence was not delivered within a time specified in each letter a motion would be issued. I should add that the final letter dated 25th May 2015, as required by the Rules, called for the defence to be delivered within 21 days of that letter, and consented to late delivery within that time. There was no response received to any of these letters. The plaintiff therefore issued his first motion for judgment on 30th June 2015, made returnable in the High Court on 13th July 2015.

9. Prior to that return date the defendants sought an extension of three weeks for the delivery of their defence, to which the plaintiff's solicitor consented. An order was made by consent to this effect on the return date. While that order refers to a two week extension of time, the parties are agreed that the extension sought and consented to by the plaintiff was three weeks. Nothing turns on that clerical error in the order as drawn up and perfected, since in any event the defendants again failed to deliver a defence prior to 3rd August 2015 (i.e. 3 weeks from 13th July 2015).

10. On 25th August 2015 the plaintiff's solicitor once again wrote to the defendant's solicitor, to which a reply was sent the following day which having stated that the solicitor handling the matter was on leave went on to state:

> *"… we have reminded counsel to finalise the drafting of the Defence in this matter and we shall revert to you within fourteen days and in the circumstances would ask if you could hold off issuing any Motion until such time."*

11. Having once again heard nothing from the defendant's solicitor within that fourteen days or at all, the plaintiff's solicitor issued and served a second motion for judgment on the 25th September 2015 returnable in the High Court on 9th November 2015.

12. The next event was that the defendants' solicitor wrote to the plaintiff's solicitor by letter dated 30th October 2015. This letter made no reference to either the previous correspondence or the motion which by then had been served, and sought no agreement to a further extension of time for delivery of defence. It simply stated as follows:

> *"Dear Sir,*
>
> *We act for Sunday Newspapers Limited in the above entitled action.*
>
> *Our client hereby offers to make amends pursuant to Section 22 of the Defamation Act 2009 in respect of the article complained of in the Statement of Claim. In accordance with Section 22, our client offers:*
>
> > *(a) to make a suitable correction and a sufficient apology;*
> >
> > *(b) to publish that correction and apology in such manner as is reasonable and practicable in the circumstances; and*
> >
> > *(c) to pay such compensation or damages (if any), and such costs, as may be agreed or be determined to be payable.*
>
> *We look forward to hearing your client's response to our proposals so that we may seek to agree the above matters as soon as possible.*
>
> *Yours faithfully etc."*

13. According to an affidavit filed by the defendant's solicitor on this appeal, when the matter came before Mr Justice Gilligan on 9th November 2015 (the return date) the court indicated that if necessary it would fix a date to hear and determine the question as to whether the plaintiff must respond to an offer to make amends prior to the delivery of a defence but went on to indicate that it was desirable that the parties, if possible, could seek to resolve the matter between themselves. The motion was adjourned to another date for hearing. That affidavit went on to state that on foot of the court's suggestion, the defendant's solicitor wrote to the plaintiff's solicitor on 10th November 2015 noting first of all that there had been no reply to the offer to make amends contained in their letter dated 30th October 2015, and that it was considered reasonable for the defendants to await that response prior to delivering a defence. The letter went on to indicate that a defence would be delivered immediately upon receipt of such response to the offer and conceded the costs of the motion.

14. One can note, as did the trial judge, that the letter of offer to make amends lacked any specifics and simply replicated the precise provisions of s. 22(2) of the Act of 2009. It is correct that the plaintiff's solicitor had not responded to this letter by the time the defendant's solicitor wrote the letter dated 10th November 2015 which was in the following terms:

> *"Dear Sir,*
>
> *We refer to the above matter and to the plaintiff's application for judgement in default of defence which is listed before Mr Justice Gilligan on Thursday, 12 November. In the interests of the expeditious resolution of the plaintiff's claim, our client made an offer of amendments under section 22 of the Defamation Act 2009 by letter of 30 October 2015. We note that you have not replied to the defendant's offer to make amends.*

As you will be aware, section 22 (3) of the Defamation Act 2009 provides an offer to make amends under section 22 shall not be made after delivery of the defence. While a person who makes an offer is not required to plead as a defence (section 23 (4)), section 23 (2) provides that it shall be a defence to a defamation action for a person to prove that he or she made an offer to make amends under section 22 and that it was not accepted, unless the plaintiff proves the matters set out in that section. Where the offer to make amends is pleaded, a defendant is not entitled to plead any other defence (section 22 (5)). In the light of the foregoing, we believe it was and is reasonable for the defendant to await the plaintiff's response to the offer to make amends before delivering a defence. Our client will deliver a defence immediately on receipt of your client's response to the offer to make amends of 30th of October, 2015. We acknowledge that the offer to make amends was made subsequent to the plaintiff's application having issued, and under the circumstances, our client will consent to your client receiving the costs of the motion with a stay on execution until the trial of the action.

We await hearing as soon as possible.

Yours faithfully etc"

15. On receipt of this letter the plaintiff's solicitor replied on the same date as follows:

"Dear Sirs,

We refer to the above-mentioned matter and yours of today's date and further to your counsel's appearance in court yesterday, in response to our motion for judgement, and yours of 30th October, we note as follows:

Your letter of 30th rehearses the wording of section 22 (5) of the Defamation Act, 2009.

It would assist us in considering your letter (and specifically, whether our client will accept the same) were you to clarify your clients' initial proposals as to what is being offered in this specific case. In other words,

(a) What correction is being proposed as being a 'suitable' one in this case and/or what apology is being proposed as 'sufficient'?

(b) What are the terms of publication which are being put forward as 'reasonable and practicable' in this case?

(c) What compensation is being suggested?

While it is understood that the foregoing matters will be a matter of discussion and/or negotiation between the parties (as contemplated by both section 22 and 23) it would be helpful (and in our contention, is necessary) for the offer to make amends to be in terms which are actually referable to the case and not simply a statement of the general terms contained in section 22.

You will appreciate that this enquiry is without prejudice to any argument which may arise by reason of the offer to make amends being delivered well outside any time period permitted for the defence of this action.

Yours faithfully etc."

16. In response to that letter, the defendant's solicitor wrote back on the same date, 10th November 2015, noting that the offer contained in the letter of offer to make amends dated 30th October 2015 was an offer within the meaning of and in compliance with s. 22 of the Act of 2009, and went on to state:

"If the offer to make amends is accepted, the matters that you refer to will either (a) the agreed or (b) will be approved or determined, as the case may be, by the Court.

Respectfully, it is for your client to either accept or not accept the offer to make amends.

Please note that Section 22 (3) refers to the delivery of the defence in the defamation action concerned and not to the time delimited by the Rules for the delivery of the defence.

We await hearing from you as soon as possible.

Yours faithfully etc"

17. The second motion ultimately came on for hearing before Mr. Justice Binchy. Written submissions were directed and were filed in advance of the hearing. Before I refer to his conclusions, it would be helpful to set forth the provisions of s. 22 and s. 23 of the Act of 2009. They are as follows:

"22(1) A person who has published a statement that is alleged to be defamatory of another person may make an offer to make amends.

(2) An offer to make amends shall:-

(a) be in writing,

(b) state that it is an offer to make amends for the purpose of this section, and

(c) state whether the offer is in respect of the entire of the statement or an offer (in this Act referred to as a "qualified offer") in respect of:-

(i) part only of the statement, or

(ii) a particular defamatory meaning only.

(3) An offer to make amends shall not be made after the delivery of the defence in the defamation action concerned.

(4) An offer to make amends may be withdrawn before it is accepted and where such an offer is withdrawn a new offer to make amends may be made.

(5) In this section "an offer to make amends" means an offer:-

(a) to make a suitable correction of the statement concerned and a sufficient apology to the person to whom the statement refers or is alleged to refer,

(b) to publish that correction and apology in such manner as is reasonable and practicable in all the circumstances, and

(c) to pay to the person such sum in compensation of damages (if any), and such costs, as may be agreed by them or as may be determined to be payable, whether or not it is accompanied by any other offer to perform an act other than an act referred to in paragraph (a), (b) or (c).

"23(1) If an offer to make amends under section 22 is accepted the following provisions shall apply:-
(a) if the parties agree as to the measures that should be taken by the person who made the offer to ensure compliance by him or her with the terms of the offer, the High Court or, where a defamation action has already been brought, the court in which it was brought may, upon the application of the person to whom the offer was made, direct the party who made the offer to take those measures;

(b) if the parties do not so agree, the person who made the offer may, with the leave of the High Court or, where a defamation action has already been brought, the court in which it was brought, make a correction and apology by means of a statement before the court in such terms as may be approved by the court and give an undertaking as to the manner of their publications;

(c) if the parties do not agree as to the damages or costs that should be paid by the person who made the offer, those matters shall be determined by the High Court or, where a defamation action has already been brought, the court in which it was brought, and the court shall for those purposes are all such powers as it would have if it were determining damages or costs in a defamation action, and making a determination under this paragraph it shall take into account the adequacy of any measures already taken to ensure compliance with the terms of the offer by the person who made the offer;

(d) no defamation action shall be brought or, if already brought, proceeded with against another person in respect of the statement to which the offer to make amends applies unless the court considers that in all the circumstances of the case it is just and proper to so do.

(2) Subject to subsection (3), it shall be a defence to a defamation action for a person to prove that he or she made an offer to make amends under section 22 and that it was not accepted, unless that the plaintiff proves that the defendant knew or ought reasonably to have known at the time of the publication of the statement to which the offer relates that:-
(a) it referred to the plaintiff or was likely to be understood as referring to the plaintiff, and

(b) it was false and defamatory of the plaintiff.

(3) Where the defendant in a defamation action made a qualified offer only, subsection (2) shall apply in relation to that part only of the action that relates to the part of the statement or the meaning as the case may be, to which the qualified offer relates.

(4) A person makes an offer to make amends is not required to plead it as a defence in a defamation action.

(5) If the defendant in a defamation action pleads the defence under this section, he or she shall not be entitled to plead any other defence in the action, and if the defence is pleaded in respect of a qualified offer only he or she shall not be entitled to plead any other defence in respect of that part of the action that relates to the part of the statement or the meaning, as the case may be, to which the qualified offer relates."

18. In his judgment, the trial judge noted that the defendants had filed no affidavit setting out any special circumstances to explain and justify the delay in delivery of the defence since the order on the first motion extending time by three weeks. He referred also to the defendants' submission that there were in fact two special circumstances which explained and justified the delay - firstly, the fact that the offer to make amends had been neither accepted nor rejected by the plaintiff, and that the defendants had given an assurance that once the offer was either accepted or rejected a defence would be delivered immediately; and secondly, that the first relief sought by the plaintiff, namely a declaration that the statements and/or photograph complained about and published are false and untrue is a relief which may be given only by the Circuit Court as provided for in s. 28 of the Act of 2009, and accordingly that the proceedings are not maintainable in their present form. The trial judge noted also the defendants' submission that by neither accepting nor refusing the offer of amends, the plaintiff was acting unreasonably, was manufacturing the default of which he complains, and engaging in an impermissible exercise of approbation and reprobation.

19. Having considered these submissions and relevant provisions of the Act of 2009, the trial judge concluded firstly that the fact that certain declaratory reliefs which the High Court could not grant had been included in the claim was not a special circumstance for the purpose of the rule. With that conclusion, I readily agree, and given its obvious lack of merit it is unnecessary to examine it further.

20. As to the second submission based on the plaintiff's failure to have accepted or rejected the offer to make amends, and the contention that the plaintiff is contriving the defendants' failure to deliver a defence in those circumstances since the offer to make amends may not be delivered after the delivery of defence, the trial judge *stated "that might well be persuasive if that was an end of*

the matter, but in my view that is not so". He went on to address the delay by the defendants. He noted that the defendants had purported to publish an apology within days of receiving the complaint from the plaintiff's solicitors, and therefore, unlike many cases where some time would often be required in order to assemble materials, seek further particulars and take legal advice, these defendants were well aware from an early stage of all the relevant circumstances, and seemed to acknowledge that some error had been made by them in publishing the material. In such circumstances, the trial judge stated:

> *"… It is clear that from the very outset, the defendants were aware of the circumstances giving rise to these proceedings and of the fact that an error was made in the publication. Arising out of that realisation, the defendants published a correction just seven days later. It seems very likely therefore that in the particular circumstances of this case, the defendants had as much information as they needed to file a defence within the time prescribed by the rules and to formulate an offer of amends for the purposes of section 22 of the Act within the same period."*

21. Again, I agree with this conclusion. Indeed, in fairness to the defendants, they did not seek to say otherwise on this appeal even though it has been argued that time was needed to consider whether or not to make the offer of amends.

22. The trial judge then referred to the three unanswered letters which the plaintiff's solicitor had written ahead of the first motion for judgment, the consent to an extension of time for delivery of defence which had been given on that motion, the failure to deliver the defence within the time agreed, the further warning letter in August 2015, the second motion that issued towards the end of the September 2015 returnable for the 9th November 2015, and the eventual letter of offer to make amends received on the 10th November 2015.

23. Having considered this chain of events and the delay, the trial judge expressed his conclusions as follows:

> *"26. No explanation at all has been given to the Court as to why it took the defendants so long to issue the letter of offer to make amends. That being the case, the Court can only infer that there is no explanation for the delay in doing so. The defendants now plead that the plaintiff was preventing them from filing the defence because he has yet to say whether or not he is prepared to accept the offer to make amends. It is certainly arguable, having regard to section 23 of the Act that the fact that a defendant is waiting to hear from the plaintiff as to whether or not an offer to make amends made by the defendant will be accepted by the plaintiff, constitutes a special circumstance for the purposes of Order 27, rule 8 (1) of the Rules of the Superior Courts. However, in considering this question, regard must be had to the conduct of the defendant to date in the proceedings.*
>
> *27. There can be no doubt at all that the offer to make amends made on the 30th October, 2015 could have been made much earlier, and most probably could have been made within the time for the filing of a defence as prescribed by Order 21, rule 1 and certainly in advance of the issue of the first motion for judgement on 30th June, 2015, not least because the defendants have chosen to make an offer to make amends in principle and not in terms. Instead, the defendants sat on their hands and chose not to make the offer until a month after the issue of the second motion for judgement. The reason for the delay therefore cannot possibly be said to be the failure of the plaintiff to respond to the letter of amends, but rather is the dilatoriness on the part of the defendants in making the offer of amends. That could not be said to be a special circumstance for the purposes of Order 27, rule 8 (1) and accordingly I will grant judgement in favour of the plaintiff and direct that damages be assessed in due course by a judge and jury."*

24. On this appeal, Counsel for the appellants has raised three issues, one of which was not pressed, and in my view rightly so. It is the fact that the warning letter written on the 25th August 2015 threatening a second motion failed to indicate a 21 day period within which the defence should be delivered if a motion was not to follow. In that regard, O. 27, r. 9 of the Rules of the Superior Courts provides that no such motion shall be issued unless such a 21 day letter has been issued, and makes no distinction between a first, second or indeed further motion in this regard. However, as pointed out by Counsel for the respondent, the reality is that following that letter dated 25th August 2015, the defendant's solicitor wrote on the following day stating that the solicitor handling the matter was on leave, but that counsel had been reminded about the matter, and indicated that they would reply further in 14 days time, and asked that no motion should issue in the meantime. Not only did the plaintiff's solicitor not issue the second motion within that requested period, but in fact desisted from doing so until 25th September 2015 having heard nothing further at all. For that reason alone, it was not perhaps the defendants' best point, but there is another reason why it was always a hopeless point on this appeal – namely that it was not raised at all in the court below. I express no view on a submission made by counsel for the respondents that in any event the failure to send a correctly worded letter may be overlooked by the court under the provisions of O. 124 of the Rules of the Superior Courts. He may well be correct, but I make no finding in that regard given the other reason for rejecting the submission made.

25. Another ground argued by the defendants was that the decision to grant judgment in default of defence in the circumstances of this case demonstrates a misunderstanding and misapplication by the trial judge of the purpose of the rules relating to motions for judgment in default of defence, namely, according to counsel, to ensure that proceedings move along at a reasonable pace, and that defendants are not shut out from defending the proceedings by an overly strict or technical application of the rules of court. In support of that argument counsel urges this court to consider the degree of the prejudice that the defendants will suffer by reason of the order made. He submits firstly that there is prejudice from the fact that damages will be now assessed by a jury and not by a judge alone as would otherwise be the case; and secondly that at the hearing before the jury for the assessment of damages the defendants will have no opportunity to put forward any defence to the claim for damages or challenge the plaintiff's evidence. Again, this argument appears not to have been made in the court below. There is no reference to it in the trial judge's judgment at any rate. But even if I overlook that difficulty and deal with the ground on its merits, I cannot overlook that this prejudice, if it be such at all, is one entirely of the defendants' own making. It was within the defendants' own control to ensure that the plaintiff's case would be heard before a judge alone. They lost that control, or at least ceded it to the plaintiff by their dilatoriness in the delivery of their defence, and/or their dilatoriness in making a decision that they would avail of the mechanisms provided for in s. 22 of the Act of 2009.

26. In my view this consequence cannot be considered to outweigh the requirement that the defendants must, like any party to litigation, pursue their defence of this litigation with diligence, efficiency and reasonable expedition in accordance with the rules of court which are devised with that worthy objective in mind. In my view the trial judge did not misapply the rule on the facts of this case. I accept, of course, that the rules exist so that proceedings move along at a reasonable pace, and that an inflexible approach or an insistence upon strict compliance with a rule which, for example, delimits the time for the taking of a step in the proceedings, would fail to acknowledge the existence within the rules themselves of a discretion to extend time in appropriate cases. But the present case is governed by a particular rule where that discretion is circumscribed in the manner described, and the defendants have failed to bring themselves within the rule, and therefore have themselves excluded themselves from the availability of the discretion permitted within O.27, r. 8 of the Rules of the Superior Courts.

27. It has been argued that the plaintiff has caused the defendants to be prejudiced in this matter because he neither accepted nor rejected the offer of amends contained in the letter dated 10th November 2015. It is argued in this regard that the prejudice arises in circumstances where, if the offer had been rejected by the plaintiff, it would constitute a full defence unless the plaintiff could prove malice. It is further submitted that if on the other hand the plaintiff had accepted the offer to make amends, matters would have proceeded differently as provided for in the Act. But again, it has to be emphasised that these are consequences which the defendants have brought upon themselves. The plaintiff is in no way to blame for the circumstances in which the defendants found themselves before the High Court. The letter of amends was received on the day after the first return date for the second motion. It was never even hinted as a possibility following the service of the proceedings and the statement of claim as far back as February 2015. All correspondence from the plaintiff's solicitor was completely ignored. It ill behoves the defendants in my view to seek to cast blame upon the plaintiff for the predicament in which they now find themselves.

28. There has been no explanation for the delay, or even the failure to answer the plaintiff's solicitor's letters. No affidavit whatsoever was filed in answer to the plaintiff's second motion in the High Court. While an affidavit has been filed in this Court for the purpose of this appeal, there is no explanation within it which even approaches an acceptable explanation for what occurred, let alone justifies it. In reality there is no explanation in circumstances where it has to be accepted that from the very outset the defendants accepted that a mistake had been made, and published an apology in a very timely manner. As it happens, the plaintiff did not consider this apology to be adequate, but that is not the point for present purposes. The point is that they knew back in February 2015 everything they needed to know in order to make a timely decision whether or not to avail of s. 22 of the Act of 2009.

29. It has been submitted by the defendants that in fact s. 22 is silent as to the time within which the offer of amends must be made, except that it must be made prior to the delivery of defence. The defendants say that they have complied with the section, and that this constitutes a special circumstance for the purpose of the rule, and that it was reasonable therefore that an opportunity be given for a response to be received to that offer before delivering a defence. I agree with the trial judge's conclusion that in many cases where a timely offer to make amends is made, it will be reasonable to delay the delivery of a defence until such time as the plaintiff has indicated a response to that offer. Each such case will have to be considered on its own facts. But in the present case, the letter of offer to make amends came very late in the day. In those circumstances, it cannot be considered to be a special circumstance, as it might be in another case where that delay did not occur. The defendants cannot call in aid their own default as a special circumstance.

30. I would add that I am not to be taken as expressing any view on the adequacy or validity or otherwise of the letter of offer to make amends in this case. The plaintiff has made the point that it is simply formulaic and follows precisely the words of the section, but contains no substance to which the plaintiff might give his consideration as to whether to accept or reject same. That question must await another case in which the question arises more directly.

31. For all these reasons I would dismiss this appeal.