

**THE HIGH COURT**

**[2015 1555P]**

**BETWEEN:**

**PAUL MCNAMARA**

**PLAINTIFF**

**AND**

**SUNDAY NEWSPAPERS LIMITED T/A SUNDAY WORLD AND EUGENE MASTERSON**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Binchy delivered on the 12th day of January, 2016.**

1. This is an application of the plaintiff for judgment in default of defence. It is the second such application of the plaintiff, the first having been issued by way of notice of motion dated 30th June, 2015 which resulted in a order (by consent) of Gilligan J. on 13th July, 2015, whereby the time for delivery of the defence was extended for a period of two weeks.

**Background**

2. In the proceedings, the plaintiff claims damages for defamation of character arising out of an article published by the defendants on 21st December, 2014. The plaintiff also claims other reliefs, including "a declaration that the statements and/or photograph made about the plaintiff and published by the defendants and/or each of them in the Sunday World on 21st December, 2014, were false and untrue".

3. Following upon the publication of the article, the defendants published a correction on 28th December, 2014, which the plaintiff claims was not of the same size or prominence as the original article and which, by reason of its lack of clarity and detail, and the fact that it was published during the holiday period between Christmas and New Year, did nothing (the plaintiff claims) to alleviate the damage caused to the plaintiff. Proceedings were issued on 25th February, 2015 and a statement of claim was delivered on the same date.

4. The plaintiff's solicitor sent warning letters regarding to the delivery of a defence to the solicitors for the defendants on 30th March, 2015, 30th April, 2015 and 25th May, 2015. Each of those letters set out a period within which the defence should be received, failing which, each letter says a notice of motion for judgment in default of defence would issue; a different period was specified in each case – fourteen days in the letter of 30th March, seven days in the letter of 30th April and twenty-one days (being the normal period required to be specified in a letter prior to the issue of a notice of motion for judgment in default of defence) in the letter of 25th May, 2015. Since no defence was received, a motion for judgment was issued and made returnable for 13th July, 2015 and a consent order as described above was made on that date.

5. No defence was delivered as agreed by the defendants within the time specified by the order of Mr. Justice Gilligan. A further warning letter issued on 25th August, 2015 informing the solicitors for the defendant that since the defendant was in default of the order of 13th July, 2015, they intended to issue a further motion seeking judgment in default of defence. The solicitors for the defendant replied on 26th August, 2015 stating that "we have reminded our 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 to such time". Nothing further occurred until the solicitors for the plaintiff issued a second motion for judgment in default of defence and served the same on 28th September, 2015, returnable for 9th November, 2015.

6. On 30th October, 2015, the solicitors for the defendants sent to the solicitors for the plaintiffs a letter of offer of amends for the purposes of section 22 of the Defamation Act 2009. This letter stated:-

"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."

7. It is clear that this letter of 30th October, 2015 was a letter in principle, and not in terms insofar as no specific offer is made and instead the offer is made verbatim in the terms of section 22(2) of the Defamation Act, 2009.

8. By letter of 10th November, 2015, the solicitors for the defendants wrote to the solicitors for the plaintiff in the following terms:-

"Dear Sir,

We refer to the above matter and to the plaintiff's application for judgment in default of defence which is listed before Mr. Justice Gilligan on Thursday, 12th November.

In the interests of the expeditious resolution of the plaintiff's claim, our client made an offer of amends under section 22 of the Defamation Act 2009 by letter of 30th 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 that an offer to make amends under section 22 shall not be made after the delivery of the defence. While a person who makes an offer is not required to plead it 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 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 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,"

9. The solicitors for the plaintiff replied to the letter of the solicitors for the defendant of 10th November on the same date. Noting that the letter of offer of amends is made in the terms of the precise wording of section 22(5) of the 2009 Act. They asked for particulars of the precise proposals on offer as follows:-

"(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?"

10. The solicitors for the defendant replied, again on 10th November, 2015 stating that if the offer to make amends is accepted, the matters referred to in the letter of the solicitors for the plaintiff will either be agreed, or will be approved or determined, as the case may be, by the Court. They stated that (in the first instance) it is for the plaintiff either to accept or not to accept the offer to make amends.

#### **Submissions of Counsel**

11. Counsel for the plaintiff relies on Order 27 rule 8 of the Rules of the Superior Courts, as amended by S163 of the Act of 2004, which, after dealing with a first motion for judgment in default of defence, goes on to state:-

"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 –

(a) Extending the time for delivery of a defence;

(b) adjourning the motion for such period as is necessary to enable a defence to be delivered within the extended time ...."

12. Counsel for the plaintiff argues that no replying affidavit was filed by the defendant in response to the motion for judgment to explain, much less advance special circumstances, to justify the failure to file a defence in the months between March and July, 2015. Furthermore, it is argued that no effort was made by the defendant to explain why the order of this Court made on 15th July was disregarded, or to explain why the solicitors for the defendants in their letter to the solicitors for the plaintiff of 26th August, 2015, indicated that they were reminding counsel to finalise the drafting of the defence. Accordingly, it is submitted on behalf of the plaintiff, that he is entitled to judgment in view of the mandatory nature of the relevant part of Order 27, rule 8(1).

13. The plaintiff denies that the letter of an offer to make amends issued by the solicitor for the defendants is a conciliatory offer, as is contended on behalf of the defendants. It is argued on behalf of the plaintiff that the delivery of the letter of offer of amends is an attempt to obtain a procedural advantage over the plaintiff. This is because if the plaintiff elects to accept the letter of offer to make amends, and agreement cannot be reached upon the terms of the amends, then the quantum of damages payable to the plaintiff will be determined by a Court rather than by a jury. Secondly, if the offer is declined, the plaintiff must then prove malice on the part of the defendant in making the publication, which is clearly a higher standard of proof than would otherwise apply.

#### **Submissions on behalf of the Defendants**

14. While it is correct to say that the defendants did not file any affidavit in response to this application, it is submitted on behalf of the defendants that there are two special circumstances which explain and justify the failure of the defendants to deliver a defence:-

1. The plaintiff has not accepted or rejected the offer to make amends made on behalf of the defendants. Since the plaintiff has been informed that a defence will be delivered immediately when he accepts or rejects the offer, and the plaintiff declines to do either, and instead seeks judgment in default. The defendants submit that the plaintiff is acting unreasonably and manufacturing the default of which he complains.

2. The first relief claimed by the plaintiff in both the plenary summons and statement of claim is a declaration that "the statements and/or photograph made about the plaintiff and published by the defendants... were false and untrue." It is submitted that a declaratory order of this kind cannot be made by this Court because that jurisdiction is expressly conferred upon the Circuit Court only pursuant to section 28 of the Act. That being the case, it is argued that the proceedings are not maintainable by the plaintiff in their present form and that this is a special circumstance which explains and justifies the defendants' failure to deliver a defence.

15. It is further argued on behalf of the defendants that, having conceded the costs of the motion (because the offer to make amends was made after the issue of the motion for judgment) that the plaintiff is contesting the entitlement of the defendants to deliver a defence at all, while at the same time reserving unto himself, by declining to accept or reject the offer to make amends, the option of conciliation. It is further submitted that, while there is no specific period set out in the Act, within which an offer to make amends must be accepted or rejected, it must be accepted or rejected within a reasonable time. Counsel relied in this regard on the

16. Counsel for the defendant further submits that the plaintiff is not entitled to "approve and reprove". He relies on the decision of Henchy J. in *Corrigan v. Irish Land Commission* [1977] 1 I.R. 317 in support of the proposition that the plaintiff cannot have it both ways, which, applied in this case, means that the plaintiff cannot seek judgment in default of defence while preserving the option of accepting or rejecting a statutory offer of conciliation and amends.

#### Decision

17. I have already set out above the terms of section 22(2) of the Act. Of relevance also, in the context of this application, is section 22(3) of the Act which states:-

"(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 an offer is withdrawn a new offer to make amends may be made."

18. For the purposes of this application, the following subsections of section 23 are of some relevance:-

"(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 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."

[In other words a plaintiff must in those circumstances prove malice on the part of the defendant.]

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

(5) If a 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."

19. It is apparent from the above that the acceptance or rejection of an offer to make amends has a bearing upon the defence that will be filed by a defendant in the event that the offer is rejected.

20. However, it is also clear that a defendant is obliged to make an offer to make amends before filing his or her defence. In the ordinary course of events, it seems to me that it is not unreasonable for a defendant to insist upon a reply to the offer to make amends before being required to deliver his or her defence. For the purpose of this application, I do not consider it necessary to determine whether or not a plaintiff is entitled to any more detail than is contained in an offer *in principle* before making a decision in this regard.

21. The defendants, by way of submissions, invite the Court to consider two matters as constituting a special circumstance for the purposes of Order 27, rule 8. The first of these is that one of the reliefs claimed is not a relief which can be obtained in this Court. Insofar as the other reliefs claimed by the plaintiff in the proceedings are clearly reliefs that the plaintiff may obtain from this Court, I do not believe that this could possibly constitute a special circumstance for the purpose of the rule, and in any event it is a matter which can be addressed in the defence itself.

22. The second special circumstance alleged by the defendants is the failure by the plaintiff either to accept or reject the offer to make amends. As stated above, the defendants argue that it is the plaintiff himself who is putting the defendants in default, by failing to do so, and on that basis it is argued that the plaintiff cannot "approve and reprove". That might well be persuasive if that was the end of the matter, but in my view that is not so.

23. Order 21, rule 1, of the Rules of the Superior Courts requires a defendant to deliver a defence within twenty-eight days from delivery of the statement of claim. In this case, that period would have expired on 25th March, 2015. Of course, it goes without saying that in very many cases the defence is not delivered within that time. In such cases, this can be due to unnecessary delay on the part of a defendant, or his legal advisors, in attending to the matter, but more often than not the failure to deliver a defence within the time prescribed by the rules is a reflection of the time that is necessarily required for a defendant to assemble the materials needed to consider the claim against him, to consult with his lawyers, seek further particulars of the claim etc. None of that arises in this case however, because 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.

24. The defendants' solicitors received three letters of warning in March, April and May 2015, before the solicitors for the plaintiff finally issued the first motion for judgment in default of defence on 30th June, 2015 and the defendants consented to an order extending the time for delivery of the defence within a further period of fourteen days.

25. The defendant having failed to deliver a defence, a further warning letter was sent by the solicitors for the plaintiff to the solicitors for the defendants on 26th August, 2015 and the second motion for judgment did not issue until 28th September, 2015. Eventually, the solicitors for the defendants issued the letter of offer of amends, another month later, on 30th October, 2015.

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 is preventing them from filing their 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 a 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 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 judgment 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 judgment. 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 judgment in favour of the plaintiff and direct that damages be assessed in due course by a judge and jury.

Counsel for the plaintiff: Mr. Benedict O'Floinn, instructed by W.B. Gavin Solicitors.

Counsel for the defendants: Mr. John Freeman instructed by Fanning and Kelly Solicitors.