

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TE WHANGANUI-A-TARA ROHE**

**CIV-2019-485-132  
[2019] NZHC 3024**

UNDER the Defamation Act 1992  
BETWEEN MAUI ASHLEY SOLOMON  
Plaintiff  
AND DAVID JAMES PRATER  
Defendant

Hearing: 19 November 2019  
Appearances: A J Romanos for plaintiff  
No appearance by or for defendant  
Judgment: 20 November 2019

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**JUDGMENT OF ASSOCIATE JUDGE JOHNSTON**

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[1] This proceeding was called in the Associate Judge's list yesterday. Before the Court was the plaintiff's application dated 24 October 2019 for certain interlocutory orders relating to discovery and interrogatories. Mr Romanos appeared for the plaintiff. There was no appearance by or for the defendant. That was as expected because, prior to the hearing, Mr Prater had emailed the Registry saying that he would not be present or represented, and making some other observations to which I will come.

[2] The position is as follows:

- (a) On 11 September 2019 I made a series of interlocutory orders including an order requiring Mr Prater to file and serve an affidavit of documents by 18 October 2019 and, by the same date, provide electronic inspection. He has failed to comply.

(b) On 4 October 2019 the plaintiff served a notice to answer interrogatories. Mr Prater has failed to respond to this.

[3] In his memorandum dated 18 November 2019, Mr Prater made it entirely clear that he has no intention of complying with either obligation. The plaintiff seeks an order compelling him to do so.

[4] The plaintiff also complains that the defendant has not given a physical address for service, only an email address. He seeks an order that the defendant now provide a physical address because, it is said, the plaintiff is unable himself to provide electronic inspection of his documentation to an email address. Given that electronic inspection is now the default position, that seems a little surprising. Be that as it may, the obvious remedy is for the Court to make an order that the plaintiff comply with his obligations in terms of sub-pt 2 of pt 9 of the High Court Rules (relating to electronic inspection of documents) by loading the documentation to a drop box and providing the defendant, by means of his email address, with the necessary information to access that drop box. I make such an order.

[5] During the course of the hearing, Mr Romanos for the plaintiff also observed that the defendant had not complied with costs awards made in relation to earlier interlocutory steps in this proceeding. That is an enforcement issue for the plaintiff. It is unnecessary for me to deal with that.

[6] I turn now to the appropriate response to the defendant's failure to discharge his obligations relating to discovery and the plaintiff's notice to answer interrogatories. In relation to this the plaintiff seeks orders requiring the defendant to comply with both obligations within ten working days, and an "unless" order to the effect that if he fails to do so he will be debarred from defending the proceeding the proceeding, together with a costs order.

[7] The usual response to the failure or refusal of a party to comply with a step in proceedings is to strike out that party's claim or defence as the case may be. The plaintiff seeks an order going one step further debarring the defendant from any further

involvement in the proceeding. As I said to Mr Romanos during the course of the hearing I am very reluctant to make any such order.

[8] An order striking out the defence would enable the defendant to attend the hearing and make submissions but would preclude him from cross-examining the plaintiff's witnesses or giving evidence himself. An order of the sort sought by the plaintiff would prevent him from taking any part in the hearing. The difference between the two orders may not be as significant as it appears because the defendant would be restricted at any hearing to making a submission that the plaintiff had not made out his case or that the case that was made out did not justify damages at the level being sought.

[9] However, in the end, the view I take is that the Court should step back from making an order which would effectively bar the defendant from any participation in the hearing.

[10] That said the defendant is now in flagrant breach of a direction from the Court in relation to discovery and has failed to comply with his obligation to respond to the plaintiff's notice seeking answers to interrogatories. It is fair to say that those breaches arise against the background of earlier breaches on the defendant's part. It is also fair to say that having regard to the terms of his 18 November 2019 memorandum the Court can have little confidence that the defendant will comply with any order that is made.

[11] Against that background, I make the following orders:

- (a) The defendant is ordered to provide standard discovery by the filing and service of an affidavit of documents and providing electronic discovery of the same pursuant to sub-pt 2 of pt 9 of the High Court Rules (which may be by emailing the plaintiff's solicitors and giving them access to a drop box in the manner described earlier) within 15 working days of today's date;

- (b) Also within 15 working days of today's date the defendant is ordered to respond to the plaintiff's notice requiring answers to interrogatories in the manner prescribed in the High Court Rules. This will require the defendant either to answer each interrogatory or to object to answer any interrogatory giving proper reasons for his refusal;
- (c) I make an order that unless the defendant complies with the orders set out in (a) and (b) above then his statement of defence will be struck out at the expiry of that 15 day period;
- (d) Finally, the plaintiff is entitled to his costs on a 2B basis in relation to this interlocutory application. I approve the calculation of these contained in Mr Romanos' memorandum of 13 November 2019 with the deletion of item 25. I am not aware that any bundle was prepared for the hearing.

Associate Judge Johnston

Solicitors:  
Langford Law, Wellington for plaintiff