CITATION:	Kurniawan v Gifkins v Proprietors [2023] NTLC 2
PARTIES:	**VIRNA KURNIAWAN** Plaintiff v **WARREN GIFKINS** Defendant v **THE PROPRIETORS — UNIT PLAN N0. 24/84 OF 93 SMITH STREET, DARWIN, NORTHERN TERRITORY** Third Party
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CIVIL
FILE NO(s):	2020-03186-LC
DELIVERED ON:	5 January 2023
DELIVERED AT:	DARWIN
HEARING DATE(s):	30 March 2022
JUDGMENT OF:	JR Gordon

CATCHWORDS:

Interrogatories; vagueness; oppression; form of answers; yes or no answers; caveated answers; admissibility of an apology

Defamation Act 2006
Personal Violence Restraining Act 2016
Local Court (Civil Jurisdiction) Rules 1998

Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd [2012] FCA 290
Aspar Autobarn Co-operative Society v Dovala Pty Ltd (1987) 16 FCR 284
Austal Ships Pty Ltd v Incat Australia Pty Ltd (No 3) (2010) 272 ALR 177
Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd [2012] FCA 290
Palmer v John Fairfax & Sons Ltd (1986) 5 NSWLR 727
James v Nationwide News Pty Ltd (1992) 110 FLR 274
Perpetual Trustees of Australia v Brenton (1985) 35 NTR 44
Prowse v Harbour Radio Pty Ltd [2016] NSWSC 57
Kermode v Fairfax Media Publications Pty Ltd (No 2) [2011] NSWSC 646
Stephen Nibbs v Australian Broadcasting Corporation [2010] NTSC 52

REPRESENTATION:

Counsel:

	Plaintiff:	W Roper
	Defendant:	R Rasmussen
	Third Party:	Nil

Solicitors:

	Plaintiff:	Turner Freeman Lawyers
	Defendant:	Hunt & Hunt Lawyers
	Third Party:	Minter Ellison

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IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 2020-03186-LC

BETWEEN:

VIRNA KURNIAWAN
Plaintiff

v

WARREN GIFKINS
Defendant

v

THE PROPRIETORS — UNIT PLAN N0. 24/84 OF 93 SMITH STREET, DARWIN, NORTHERN TERRITORY
Third Party

DECISION OF L GORDON JR

(Delivered 5 January 2023)

1. The substantive matter before the Court is an application for damages pursuant to section 7 of the *Defamation Act 2006*, brought by way of Statement of Claim filed 17 September 2020.

2. It is unnecessary to detail the factual nexus of the case or the matter complained of for the purposes of the current Interlocutory Application. The facts of the matter, save for the content of the answers to any interrogatories as discussed below, do not bear significant weight as to the determinations herein.

3. On 13 July 2021 the Plaintiff filed a Notice to Answer Interrogatories, which was subsequently answered by way of Affidavit promised by the Defendant on 23 September 2021.

4. The Plaintiff, being unsatisfied with a number of answers therein brought an Interlocutory Application filed 23 February 2022 seeking further verified answers in relation to interrogatories 4, 5, 6, 7, 8, 11, 12, 13, and 14.

5. The Defendant opposed the application and filed written submissions on 23 March 2022. The Plaintiff filed written submissions in support of the application on 17 March 2022.

6. It should be noted that the Third Party in the proceedings, joined by Third Party Notice filed 11 October 2021 who defends the proceedings in accordance with their Notice of

Defence filed 19 November 2021 did not appear at the Interlocutory hearing and was not heard in relation to the interrogatory dispute.

7. The interrogatories have been issued pursuant to Part 17 of the *Local Court (Civil Jurisdiction) Rules 1998*. It is fair to note that both parties have been non-compliant with certain time frames[1] regarding the interrogatories however neither party took issue in this regard and I do not intend to belabour the timing issues in such circumstances.

8. The purpose of interrogatories is well established. As noted by Mansfield J in *Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd* [2012] FCA 290 at 25 (references omitted):

> *"The ultimate aim of the process of discovery of information by interrogatories is to shorten the trial and save costs. They are to enable a party to litigation to obtain discovery of material facts in order either to support or establish proof of his or her own case, or to find out what case (but not the evidence) the party has to meet; or to destroy or damage the case brought by his or her opposition"*

9. There are also well-settled grounds for objecting to interrogatories[2], with the primary complaint in the current matter relating to concerns of vagueness and oppressiveness. The disputed interrogatories and the objections raised are discussed below.

Interrogatory 4

10. Interrogatory 4 flows from an affirmative answer to interrogatory 3 being "*At the time of the matter complained of did you have any information with respect to any of the material therein?"*

11. The Defendant was then asked:

    a) *state what information you had;*

    b) *who or what was the source of the information (identify specifically what information);*

    c) *identify all documents containing such information which you had in your possession at the time of the publication of the matter complained of;*

    d) *identify all documents containing such information as to which the you had been informed of their contents or parts thereof but which you did not have in your*

[1] Noting Interrogatories were initially directed by be administered on or before 11 June 2022 and the Defendant's (who was self-represented until 10 September 2021) answers were not provided within 28 days per R 17.03.

[2] See for instance Aspar Autobarn Co-operative Society v Dovala Pty Ltd (1987) 16 FCR 284; Austal Ships Pty Ltd v Incat Australia Pty Ltd (No 3) (2010) 272 ALR 177 & Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd [2012] FCA 290.

possession at the time of publication of the matter complained of and provide a complete description as to the terms by which these documents were described to you.

e) *state the use made of each of the documents described or referred to in (c) and (d) above;*

f) *identify any such information which consisted of an oral communication and state the substance of what was said by each such person;*

g) *identify all matters of past experience and background or of contemporary history or notoriety and anything else relating to the matter complained of which occurred to you prior to its publication.*[3]

12. These interrogatories were initially objected to on the basis that it was "*broad, vague and oppressive, and any relevant material is contained in the Notice of Defence and the Lists of Documents filed in this matter*" and further that the sources of information disclosed in interrogatory 5 may assist in answering number 4.[4]

13. However, after a consideration of relevant authorities, most relevantly *Palmer v John Fairfax & Sons Pty Limited*[5] ('*Palmer*') and *James v Nationwide News*[6] and their application to the defence of qualified privilege; the Defendant conceded the need to answer the interrogatory.

14. Caveating this concession however is the Defendants submission that a number of authorities do not permit some of the answers which the Plaintiff seeks. I agree with this submission, for the reasons set out below.

15. In relation to interrogatory 4(b) the Defendant will be directed to answer, but not to the extent that any such answer offends the principles established in *Perpetual Trustees of Australia v Brenton*[7]. I agree with the Defendants submission[8] that the application of principles concerning particulars are apt to apply to interrogatories, as both concern and constrain themselves to matters in issue between the parties.

16. To the extent the interrogatory seeks to identify any witness to be called by the Defendants, the Defendant need not answer, unless "*the name of the person is a substantial part of a fact material to an issue in the case, or an essential element in the case*".[9]

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[3] Annexure "A" to the Affidavit of Terrence Louis Goldberg promised 23 February 2022
[4] Affidavit of Warren Hugh Geoffrey Gifkins filed 23 September 2021 at para 4.
[5] (1986) 5 NSWLR 727
[6] (1992) 110 FLR 274
[7] (1985) 35 NTR 44
[8] Defendants written submissions in respect of the Plaintiffs Application filed 23 February 2022 filed 23 March 2022 at para 20
[9] *Perpetual Trustees of Australia v Brenton* (1985) 35 NTR 44 at 46

17. Further, in my view interrogatory 4(e) (at 11(e) above), is inconsistent with authority. In *Prowse v Harbour Radio Pty Ltd*[10] *('Prowse')* her Honour McCallum J affirmed her findings in *Kermode*[11] where she declined to require the Defendant to provide an explanation of their opinions[12]. *Prowse* further applied the findings of Hunt J in *Lewis v Page*[13]who determined:

> *"The second paragraph of this interrogatory asks the defendant to state why he held such opinions... Leave to ask it would be refused in any event because it could be relevant only to the reasonableness of the defendant's opinion and not to the honesty with which he held that opinion. It matters not whether the opinion be biased or prejudiced, as long as it is honestly held:* Kemsley v Foot *[1952] AC 345 at 357;* Turner v MGM Pictures Ltd *[1950] 1 All ER 449 at 461."*

18. The Defendant will not be directed to answer interrogatory 4(e).

19. The Defendant submits that to a large degree, the matters to which it has been conceded an answer is required in relation to interrogatory 4, have been answered in interrogatory 5. For the avoidance of any confusion or misinterpretation across the two answers, and noting that per this submission, that the task is largely done and will merely be repeated, my view is that verifying answers to interrogatory 4 are not oppressive and ought be done separately to interrogatory 5.

20. Save for my findings above in relation to interrogatories 4(b) & (e), the Defendant will be directed to answer interrogatory 4.

Interrogatory 5

21. Interrogatory 5 asks:

"*In respect of each source of information for the matter complained of (specifying each source) at the time of publication of the matter complained of, did you have a view as to:*

a) the nature and/or quality of the information furnished by the source;
b) the accuracy of the information furnished by the source;
c) whether the source was biased against the plaintiff;
d) whether information furnished by the source required corroboration?"[14]

22. The Plaintiffs objection to the Defendants answer is twofold. Firstly, that the answers given should be in a 'yes or no' format and secondly that the answers (to either interrogatory 5 or 6) cannot be caveated by the words '*the main sources of information*'.

[10] [2016] NSWSC 57
[11] *Kermode v Fairfax Media Publications Pty Ltd (No 2)* [2011] NSWSC 646 (27 June 2011) (McCallum J)
[12] *Prowse v Harbour Radio Pty Ltd* [2016] NSWSC 57 at 5
[13] Supreme Court of New South Wales, 14 July 1989 (unreported)
[14] Annexure "A" to the Affidavit of Terrence Louis Goldberg promised 23 February 2022

23. Dealing first with the use of the caveat '*the main sources of information*'.

24. The Plaintiff made the following submissions:

> *"[O]ne of the problems that I had with the potential answer to interrogatory 5; this is where Mr Gifkins says, "I object to this interrogatory as it's too broad, vague and oppressive; however, as to the main sources;" now this is the problem; he can't say "the main sources," he's got to indicate what sources he had.*
> *He can't just say, "Ah, I had some but now, these are the important ones…*
> *[H]e cannot say, "this is the main," because that's not answering the question.*
> *That's leaving a whole gap there…*
> *One of the important things about interrogatories is that it helps to narrow the issues, it helps to work out what evidence ought to be called and shouldn't be called, for example, and helps to confine the way in which the case is run."*[15]

25. I agree. As was noted in *Palmer:*

> *"The admission which the plaintiff sought from the defendant by the interrogatory in question in the present case was that the material disclosed in the answer to it is the whole of what was in the defendant's possession at the time of publication… [to] obtain a finding in his favour that that information did not reasonably give rise to the imputations conveyed. For that purpose, the whole of the information in the defendant's possession at the relevant time must be disclosed in the answer."*[16]

26. The use of the qualification 'the main sources' introduces a potential uncertainty as to the completeness of the answer and should not be allowed. The Defendant will be directed to answer as to all sources.

27. With respect to the second arm of the argument, I share the view of the Defendant. The Defendants submissions in relation to interrogatory 5 are:

> *"22) The Plaintiff's Submissions contend that the subject interrogatory required a "yes" or "no" response.*
> *23) Firstly, it ought be noted that the Plaintiff's contention is not that the subject interrogatory has not been answered, rather the Plaintiff's complaint is with the nature of the answer.*
> *24) Secondly, the submission that the subject interrogatory required a limited response, is patently misconceived.*
> *25) The subject interrogatory clearly requires the Defendant to specify each source.*
> *26) The provision of yes or no answers absent the articulation of a source, would be meaningless."*[17]

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[15] Transcript of proceedings at p 16

[16] *Palmer v John Fairfax & Sons Pty Limited* (1986) 5 NSWLR 727 at 7

[17] Defendants written submissions in respect of the Plaintiffs Application filed 23 February 2022 filed 23 March 2022 at paras 22- 26

28. The Defendant detailed 4 events referred to in the Status Report, that being the matter complained of, which he characterised as:

   a) "The Dog Case";
   b) "The Lock-Box, Sticker and Wi-Fi Case";
   c) "Personal Violence Protection Orders"; and
   d) "Criminal Cases"[18]

29. On my review of the answers to the interrogatories for each category I find as follows:

30. Re. the "The Dog Case":

   a) the nature and/or quality of the information furnished by the source: Answer insufficient – an independent tribunal being the Northern Territory Civil and Administrative Tribunal is identified however the Defendant's view of the quality of the information is not provided.
   b) the accuracy of the information furnished by the source: Answered – the Defendant was satisfied.
   c) whether the source was biased against the Plaintiff: Answered – No.
   d) whether information furnished by the source required corroboration: Answered – No.

31. Re. the "Lock box, sticker & wifi case"

   a) the nature and/or quality of the information furnished by the source: Answered – The Defendant was satisfied.
   b) the accuracy of the information furnished by the source: Not answered.
   c) whether the source was biased against the Plaintiff: Not answered.
   d) whether information furnished by the source required corroboration: Not answered.

32. Re. the "Personal Violence Protection Orders"

   a) the nature and/or quality of the information furnished by the source: Answered – The nature of the information was personal experience. Although the quality of the knowledge was not strictly addressed, it seems unlikely the Defendant would question the reliability of his own experience.
   b) the accuracy of the information furnished by the source: Not answered.
   c) whether the source was biased against the Plaintiff: Not answered.
   d) whether information furnished by the source required corroboration: Not answered. Although evidence of potential corroboration was given, the requirement for further corroboration was not addressed.

[18] Affidavit of Warren Hugh Geoffrey Gifkins filed 23 September 2021 at para 5.

33. Re. the “Criminal Cases”

a) the nature and/or quality of the information furnished by the source: Answer insufficient. The submissions of the Plaintiff below are accepted and a further answer is required:

> *“[H]e says he got it from the NT News. Now, that may be a well-known news source in the Northern Territory; I profess my ignorance whether that's a particular newspaper or a channel or a radio station… Is it a particular article that was published? Is it a radio broadcast he listened to? Was it the TV news that he watched?*
>
> *One might expect him to say, "Well, okay, I watched the NT News on this night, presenter gave this information. I took the information to be accurate and honest and reliable because it presented on the NT News, and I assumed that they, you know, they took steps to verify it," as an example.”*

b) the accuracy of the information furnished by the source: Answered – Yes the Defendant was satisfied as to accuracy.

c) whether the source was biased against the Plaintiff: Answered – Yes, no indications of bias.

d) whether information furnished by the source required corroboration: Answered – Yes, further corroboration was not required.

34. In relation to interrogatory 5 the Defendant will be directed to provide better answers, as to all sources of information, not just those he identifies as the ‘main sources’, including but not limited to:

a) “The Dog Case” interrogatory 5 (a), in relation to the nature and quality of the information furnished;
b) The “Lock box, sticker & Wifi case” interrogatory 5(b) regarding the accuracy of the information furnished; (c) & (d);
c) The “Personal Violence Protection Orders” interrogatory 5 (b), (c) & (d); and
d) The “Criminal Cases” interrogatory 5 (a).

Interrogatory 6

35. The Plaintiffs objection on the basis of the use of the words “the main sources” which depletes the quality of the Defendants evidence in relation to interrogatory 6, is dealt with and remedied, above.

36. The Defendants objection to interrogatory 6 is:

> *"I object to this interrogatory as it is vague and, in the alternative, it is oppressive. However, I was satisfied with the nature, quality and accuracy of the information provided as described in my answer to interrogatory 5."*[19]

37. The Plaintiff submits that that the interrogatory is legitimately founded on the basis that if there are views formed and set out in answer to interrogatory 5 (which there are) then the Plaintiff is entitled to enquire further as to those views, hence interrogatory 6.

38. Had the Defendant adopted the 'yes or no' mode of answering interrogatory 5, which in my view, he was not bound to do, then interrogatory 6's relevance and purpose becomes clearer.

39. I expect that some of the additionally directed answers to interrogatory 5 may resolve some of the deficiencies in the answers (or lack thereof) to interrogatory 6, particularly 6(a), however this of course will not be known until such time as the further answers are furnished.

40. I do not share the Defendants view that this interrogatory is vague, particularly when taken in context of the answers given in interrogatory 5.

41. In considering oppression I am mindful of the tests espoused in *Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd*[20]:

> *"If the energy, effort, time and cost required to address the interrogatories is not reasonably proportionate to the end sought to be achieved, then the interrogatories should not be administered. In making a decision, a balancing exercise must be undertaken: the benefits of narrowing and clarification of issues against the costs and the burden placed over the respondents inherent in the task of answering the written questions fully and accurately."*[21]

42. Considering the stage of the proceedings and noting the foreshadowing of amended pleadings discussed in the course of this application, the possible overlap of evidence across interrogatories 5 and 6 and the potential for narrowing and defining issues in dispute, I am not of a view that requiring answers to interrogatory 6 is oppressive in all of the circumstances.

43. Accordingly, I will direct that answers are provided.

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[19] Affidavit of Warren Hugh Geoffrey Gifkins filed 23 September 2021 at para 10

[20] [2012] FCA 290

[21] Ibid at 36

Interrogatory 7

44. I do not intend to set out in full either interrogatories 7 & 8, nor the answers to same due to the length of each, save for the examples extracted below relied upon as the basis of the determinations regarding both.

45. The Plaintiff submits that the answers to interrogatory 7 "… *are evasive and contravene the obligations placed upon the defendant by the LOCAL COURT (CIVIL JURSIDICTION) RULES 1998. Rule 17.04(3). They require a 'yes' or 'no' response."*[22]

46. The Defendant argues that the interrogatories have been 'comprehensively answered', that there is no articulated basis to seek any further answers[23] and that the Plaintiffs complaint is effectively that they don't like the manner in which they have been answered, not that there has been a failure to adequately answer.

47. In my view, there are a number of examples whereby the Defendant cannot and should not be constrained to 'yes or no' answers.

48. Interrogatory 7((a) provides:

At the time of publication of the matter complained of, did you intend it to convey of the plaintiff that:

> *a) The plaintiff was knowingly involved in 1 NTCAT case, 3 Violence protection orders and 1 criminal case which were not genuine and were driven by a desire to intimidate, harass, annoy and frustrate the Committee's substantive work;*

49. The Defendant answers:

At the time of publication:

> *a) I intended to convey that the Plaintiff was knowingly involved in 1 NTCAT case, 3 violence protection orders and 1 criminal case which appear to be driven by a desire to intimidate, harass, annoy and frustrate the Committee's substantive work. I did not intend to convey, and did not convey, that the matters were not genuine.*[24]

50. Where the Defendant is being interrogated in relation to a number of separate propositions he is entitled to respond to each individually, to ensure the accuracy of his evidence. In the example above, if the Defendant is compelled to answer yes or no only he would be bound to accept (or deny) in full all elements of the interrogatory when the more accurate answer (in the view of the Defendant) is 'yes' to the Plaintiff's involvement

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[22] Applicants Submissions filed 17 March 2022

[23] Defendants written submissions in respect of the Plaintiffs Application filed 23 February 2022 filed 23 March 2022 at para 35-36

[24] Affidavit of Warren Hugh Geoffrey Gifkins filed 23 September 2021 at para 11(a).

and motivation in various legal proceedings and 'no' to the bona fides of such proceedings.

51. Were the Defendant directed to answer in a yes or no format the answer would apparently be 'yes <u>and</u> no', which presents obvious difficulties and perhaps better reflects an example of the potential evasiveness complained of by the Plaintiff.

52. A further example is seen in interrogatory 7(b) which reads:

At the time of publication of the matter complained of, did you intend it to convey of the plaintiff that:

> *a)* [Omitted]
> *b) The plaintiff became aggressive and behaved in an intimidating and harassing manner against Committee members Judy Richardson, Warren Gifkins and Jason Gay when she received an NTCAT notice which behaviour resulted in a number of Protection Orders being made by the Court against her;*

53. The Defendant's answer is:

> *"b) I intended to convey that the Plaintiff became aggressive and behaved in an intimidating and harassing manner against Committee members Judy Richardson, Jason Gay and I when she received an NTCAT notice which behaviour resulted in a number of Protection Orders being made by the Court against her. Further, I advise that Jason Gay was never a Committee member."* [25]

54. Here, compelling the Defendant to answer simply yes or no would result in a situation where the Defendant would be prevented from correcting a minor factual error (that Jason Gray was not a committee member). Clearly, it is not acceptable to require a 'yes or no' answer, which results in known inaccuracies, potentially leaving the Defendants credibility unwittingly subject to attack.

55. Interrogatory 11(c) is as follows:

At the time of publication of the matter complained of, did you intend it to convey of the plaintiff that:

> *a)* [Omitted]
> *b)* [Omitted]
> *c) The plaintiff was responsible for bringing before the local courts 11 Personal Violence Protection Orders and 2 criminal cases whilst her partner prosecuted another NTCAT case challenging the lawfulness of a lock-box, a sticker and building Wi-Fi infrastructure being on common property;*

[25] Affidavit of Warren Hugh Geoffrey Gifkins filed 23 September 2021 at para 11(b).

56. In my view, this interrogatory contains no less than 6 individual propositions:

a) That the Plaintiff was responsible for bringing before the Local Court 11 Personal Violence Restraining Order cases;
b) That the Plaintiff was responsible for bringing before the Local Court 2 criminal cases; and
c) That the Plaintiff's partner prosecuted a Northern Territory Civil and Administrative Tribunal case challenging:
   i. A lock box;
   ii. A sticker;
   iii. Wifi infrastructure

57. The Defendant is entitled to hold an individual view on each of these propositions; it is not the case that an affirmative answer on one proposition must necessarily produce the same outcome for each. He should be not compelled to simply yes or no across the entire interrogatory.

58. For the balance of interrogatory 11 ((d) – (i)) in my view, they are answered, variously in the affirmative and negative. Although the Defendant adopts the practice of restating the question in his answer, for instance "*I intended to convey that the Plaintiff became aggressive against Committee Members during BBQs by the pool area*"[26], this does not nullify or obfuscate his evidence and in my view, his answers would not be of greater value or clarity were they simply 'yes' or 'no'.

59. No further directions will be made in relation to interrogatory 7.

Interrogatory 8

60. The Plaintiffs complaint in relation to interrogatory 8 mirrors that of interrogatory 7, in that the answers provided should be in 'yes or no' format.

61. Interrogatory 8 is essentially a repeat of interrogatory 7(a) – (i) except that rather than exploring what the Defendant *intended to convey*, on each of the sub points he is interrogated as to his *belief* at the time of publication.

62. For the reasons set out above, I do not accept the submission that yes or no answers should be ordered.

63. There is a second component to the complaint in relation to interrogatory 8; that the second half of the interrogatory which is unnumbered and appears after 8(i) has been ignored and remains unanswered. The second half of the interrogatory reads:

[26] Affidavit of Warren Hugh Geoffrey Gifkins filed 23 September 2021 at para 11(d).

If in any instance the answer is yes, specify in relation to each instance:

> *(i) The basis of such belief;*
> *(ii) All enquiries made by you into that particular matter, including by whom and of whom each enquiry was made, and the response received to it as well as the dates and times the enquiries were made;*
> *(iii) The source or sources of all information on which the belief was founded, and in relation to each such source the defendant's reasons for regarding it as reliable and accurate.*

64. The Defendants answers dispose whether he did or did not hold a belief in relation to items 8(a)-(i), he does not provide answers detailing the basis, enquiries or sources which informed such beliefs.

65. The Defendant confirms he held certain beliefs in relation to interrogatories 8 (a), (b), (c) (in the relation to the Plaintiff's partners NTCAT litigation only), (d), (e), (f) and (i).

66. The Defendant, having failed to address this component of the interrogatory, will be directed to answer, however in doing so, I reiterate my observations in paragraphs 15 – 17 above with respect to the identification of witnesses and the explanation of opinion.

Interrogatory 11

67. The Plaintiff asks:

> *As at the date of publication of the matter complained of did you dislike the plaintiff?*

68. The Defendant answers:

> *I object to this interrogatory as it is not a proper request and it does not relate to a question in issue between the parties*[27]

69. The Plaintiff submits that the question goes to the issue of malice and aggravated damages.

70. The Defendant makes various submissions about the Plaintiffs pleadings arguing that there is no pleading of malice and that any claim for aggravated damages is bereft of material facts noting "[*i]t is beyond dispute that a party need not plead to particulars and that the same cannot fill gaps in a demurrable pleading"*[28].

71. The Defendant relies upon the decision of Master Luppino (as he then was) in *Stephen Nibbs v Australian Broadcasting Corporation* [2010] NTSC 52 to assert the need for

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[27] Affidavit of Warren Hugh Geoffrey Gifkins filed 23 September 2021 at para 15.
[28] Defendants written submissions in respect of the Plaintiffs Application filed 23 February 2022 filed 23 March 2022 at para 39

specificity in pleadings as to what Plaintiff will allege to be the facts, particularly in relation to defamation cases. Mr Roper for the Defendant, argued there is no obligation on the Defendant to seek to strike any inadequate pleadings, he is entitled proceed on the case as pleaded. The Plaintiff (and in indeed the Defendant) will stand or fall on their pleadings and the onus falls to the party pleading to ensure they have adequately put the issues for determination before the Court.

72. Ultimately, and noting amendments to pleadings were ultimately foreshadowed at the conclusion of the interlocutory hearing, I have determined that I need not make any findings as to the adequacy of the pleadings in order to determine whether interrogatory 11 ought be answered.

73. The second arm of the Defendants objection relates to the subjective nature of the evidence the Defendant is being compelled to answer. In written submissions it is argued:

> *"It calls upon the Defendant to form a subjective view as to what "like" means in this context. Moreover, whether someone likes or dislikes another person (whatever that may subjectively mean to them) cannot be probative of malicious intent."*[29]

74. Mr Rassmusen for the Plaintiff concedes that a dislike will not be probative of malice but argues:

> *""Did you dislike the plaintiff?" Now, not determinative, I accept, but one of the indicia, one of the matters that one puts together in time and case together on malice. So a yes or no answer to that wouldn't destroy his defence of qualified privilege and show malice but it goes to help."*[30]

75. In my view an individual's view as to what constitutes 'disliking' and how that may, or may not, affect their dealings with such a person is of such a subjective nature that ordering such an interrogatory be answered doesn't, in my view, advance the purposes of interrogatories.

76. For instance, in the retail realm where 'the customer is always right' it is not difficult to imagine a scenario where a challenging customer engenders a feeling of dislike in the sales person and despite this dislike, never translates into any adverse actions, behaviours or consequences for either party.

77. Asking the Defendant whether he disliked the Plaintiff, particularly in the absence of any particulars or definition of what it is to 'like' someone, is of such low probative value and vulnerable to misapplication or misapplication that it will not assist the proceedings, shorten the trial, prove or disprove either parties case.

78. The Defendant will not be directed to answer interrogatory 11.

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[29] Ibid at 43

[30] Transcript of proceedings at p 18

Interrogatory 12

79. The Plaintiff asks:

> *By publication of the matter complained of did you intend the persons to whom you published it to think the less of the plaintiff?*

80. The Defendant answers:

> *I object to this interrogatory as it is not a proper request and it is does not relate to a question in issue between the parties*[31]

81. The dispute regarding whether malice and/or aggravated damages are adequately plead and therefore constitute a live issue before the Court is traversed above in relation to interrogatory 11.

82. I note the pleadings set out in the Reply filed 13 July 2021 (which had not been brought to counsel for the Defendants attention at the time of the hearing) largely dispense with any argument that the issue of malice is not in issue before the Court. Irrespective, the Defendant continues to assert the inadequacies in the pleadings for aggravated damages and reply upon same for the basis of their ongoing objection.

83. Nonetheless, the Defendant states:

> *As to Interrogatory 12 and should the Plaintiff amend its Statement of Claim so as to properly advance a claim for aggravated damages, the Defendant would be prepared to provide a further verified affidavit answering that interrogatory. We are instructed the answer will simply be "no".*[32]

84. I accept the submission advanced on behalf of the Plaintiff that damages, the quantum and nature of damages are inherently in issue in a claim for defamation. But that doesn't dissuade from the need for the heads of damage to be properly plead. I concur with the remarks of Mr Roper for the Defendant:

> *"… you need to plead aggravated damages or you need to properly plead aggravated damages (inaudible) foundation material facts upon which you rely.*
> *You can't simply say, "And we've suffered loss and damage, and in addition to loss and damage, we want aggravated damages," without spelling out the material facts upon which you rely."*[33]

[31] Affidavit of Warren Hugh Geoffrey Gifkins filed 23 September 2021 at para 15
[32] Defendants written submissions in respect of the Plaintiffs Application filed 23 February 2022 filed 23 March 2022 at para 44
[33] Transcript of proceedings at p 22-23

85. As I see it, I can approach the dispute regarding interrogatory 12 in one of two ways. Firstly, conduct a full analysis and make a determination in relation to the adequacy or otherwise of the pleadings of aggravated damages in the Statement of Claim. If satisfied as to the deficiencies as asserted by the Defendant, provide the Plaintiff the opportunity to amend the pleadings, and thereafter the interrogatory, as currently drafted could be put to the Defendant without objection and a verified answer of 'no' will be entered into evidence.

86. Alternatively, if the Defendant is not directed to further answer interrogatory 12 and the Plaintiff maintains that aggravated damages are sufficiently plead and that such relief is open to the Court to grant, should the claim be successful, then the Plaintiff still has her answer – 'no'. Albeit not verified or entered into evidence but nonetheless on the court record by virtue of the written submissions filed, on instructions, by counsel for the Plaintiff.

87. Thus, irrespective of my view of whether aggravated damages are adequately plead, or whether they are plead in an alternate form in the future, when the Defendant is asked: '*by publication of the matter complained of did you intend the persons to whom you published it to think the less of the plaintiff?*' the answer will be no.

88. In my view this is sufficient. It became apparent during the course of the interlocutory hearing that amendments to pleadings are likely. Whether this is a course which the Plaintiff seeks to adopt in the future, remains to be seen. However, noting the delays this matter has already faced (in part by the Defendant's change in representation and periods of self-representation, the length of time taken by the Plaintiff to bring this application and admittedly, the time taken to deliver a decision regarding same, for which I am apologetic), there is merit in adopting a course which serves to assist an expeditious determination of the substantive proceedings.

89. The Defendant will not be directed to answer interrogatory 12.

Interrogatory 13

90. During the course of the hearing of the matter counsel for the Plaintiff acknowledged that the Defendant had in fact answered the question and withdrew the application for a better answer to interrogatory 13.

91. No further directions will be made with respect to interrogatory 13.

Interrogatory 14

92. The Plaintiff asked:

> *Did you ever publish in relation to the plaintiff and the matter complained of any:*
>
> *a) apology;*
> *b) retraction;*
> *c) correction;*
> *d) clarification.*
>
> *If so, specify by what means and on what day or days as well as the content both in words or images of the apology, retraction, correction or clarification.*

93. The Defendant answered:

> *I object to this interrogatory on the basis that such information is not admissible in these proceedings.*[34]

94. The Plaintiff asserts that the interrogatory is relevant to the issue of damages[35] arguing that it is possible that an apology intended to come to the attention of the Plaintiff might in fact not reach her or that a verbal apology may be asserted, which would not appear in discovery. Counsel for the Plaintiff did not address ss 18(1) and 19(2) of the *Defamation Act 2006.*

95. The *Defamation Act 2006* provides:

18. ***Inadmissibility of evidence of certain statements and admissions***

> *(1) Evidence of any statement or admission made in connection with the making or acceptance of an offer to make amends is not admissible as evidence in any legal proceedings (whether criminal or civil);*
>
> *(2)* [not applicable].
>
> And at section 19:

19. ***Evidence of an apology on liability for defamation***

> *(1) An apology made by or on behalf of a person in connection with any defamatory matter alleged to have been published by the person:*
>
> > *(a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter; and*

[34] Affidavit of Warren Hugh Geoffrey Gifkins filed 23 September 2021 at para 18
[35] Applicants Submissions filed 17 March 2022

(b) is not relevant to the determination of fault or liability in connection with that matter.

(2) Evidence of an apology made by or on of a person in connection any defamatory matter alleged to have been published by the person is not admissible in any civil proceedings as evidence.

(3) [not relevant to question of interrogatories as sought by Plaintiff]

96. Details of any apology (in the event one has been, or is ultimately made) may have a role to play in the proceedings with respect to mitigation of any damages or costs. There may be legitimate argument regarding whether things said or done constitute an apology and how that effects the admissibility of evidence.

97. However, at this stage and in the absence of any indication that an apology does or doesn't exist, I am duly satisfied that s 19(2) precludes the Defendant from being compelled to answer interrogatory 14 (comprising a) – d)).

98. This disposes with the dispute regarding interrogatories.

99. Additionally, the Defendant seeks orders in relation to his application for security for costs filed 21 February 2022. While the application did not proceed and the Defendant is content for it to be dismissed, the Defendant nonetheless seeks the costs of and incidental to the application.

100. The Defendants application of 21 February 2022 sought security for costs on the basis of an unpaid costs order between the parties in relation to a *Personal Violence Restraining Act* application. This costs order was made against the Plaintiff on 10 February 2021 in an amount of $2,400.[36]

101. The Plaintiff was put on notice by correspondence between legal representatives on 8 February 2022 that, should the costs remain unpaid in 7 days then an application would be brought in the instant proceedings.[37]

102. Ultimately the costs order was discharged, but not before the Defendant incurred the costs of bringing his interlocutory application.[38]

103. The Defendant submits that the Plaintiffs conduct in making payment on demand more than a year after the costs were due and only in the shadow of a potentially negative impact in these proceedings constitutes a capitulation on behalf of the Plaintiff and in such circumstances warrants a departure from costs in the cause.

[36] Defendants Written Submissions in Respect of his Application filed 21 February 2022 at para 3
[37] Ibid at para 6
[38] Ibid at para 8

104. The Plaintiff, in submissions opposing the making of a costs order in relation to the Defendants interlocutory application, makes much of the delay in pursuing payment of the costs order. Noting enforcement was not pressed for over 12 months and then the Plaintiff was allowed just 7 days to make payment. In my view this is irrelevant.

105. None of the steps taken by the Defendant were outside the Rules of Court or timeframes therein. The Plaintiff stood in breach of her costs order for in excess of a year, that is a decision for her. It should not be for the Defendant to incur further costs and inconvenience in enforcing the order of the Court, the Plaintiff should have acceded to the decision of the Court when it was made, in February 2021. Not when she has formed a view it has become disadvantageous to remain in breach of the costs order in light of her defamation proceedings.

106. Thereafter the Plaintiff argues that the application for security for costs was foredoomed to fail. This will of course remain unknown, the application now not being pressed.

107. The Defendant concedes that the starting point for an order for costs is "*costs in the proceeding unless the court orders otherwise*" pursuant to r63.18 of the *Supreme Court Rules 1987*[39] but argues that the conduct of the Plaintiff was so unreasonable that the Court ought depart from the usual course in this circumstance.

108. As noted above, I see nothing reasonable in how the Plaintiff responded to the costs order issued against her in the personal violence proceedings. Her seeming ignorance or ambivalence to the orders of this court are concerning. However, I can only consider the reasonableness of the conduct of the parties in relation to this application and proceeding when considering whether a costs order should be made herein.

109. In this regard, I find that the Defendant successfully used this proceeding as a vehicle to enforce the previously unsatisfied costs order, an unusual approach perhaps, but for all intents and purposes, a successful one. However, his application for security for costs is undetermined, and will remain so.

110. For the Plaintiffs part, she apparently identified a means by which to circumvent the Defendants intention for security for costs, by paying the costs order, and potentially saving both parties the costs of a contested application. I cannot find this unreasonable.

111. Although there is some argument about the diligence of the Plaintiff in attending to the costs order when put on notice of the application, and some factual debate regarding the date of issue of a cheque and its arrival at the Defendants legal representatives; in the limited time period all of the above transpired and the application was bought, I do not find it necessary to reach any formal conclusions in this regard, noting it does not alter my view set out at paragraph 110 above.

[39] Ibid at para 14

112. Accordingly, the Defendants application filed 21 February 2022 is dismissed with the costs of same to be costs in the cause.

113. The parties are at liberty to apply in relation to the Plaintiff's interlocutory application of 23 February 2022.

114. The orders in intend to issue with respect of the interlocutory applications are below.

ORDERS:

1. Within 28 days he Defendant answer (with verification) the following interrogatories that have been administered by the Plaintiff:

    a) Interrogatory number 4, excluding 4(e);
    b) Interrogatory number 5, including all sources of information for the matter complained of, including but not limited to;
        i. "The Dog Case" interrogatory 5 (a), in relation to the nature and quality of the information furnished only;
        ii. The "Lock box, sticker & Wifi case" interrogatory 5(b), regarding the accuracy of the information furnished; (c) & (d) only;
        iii. The "Personal Violence Protection Orders" interrogatory 5 (b), (c) & (d) only; and
        iv. The "Criminal Cases" interrogatory 5 (a) only.
    c) Interrogatory number 6;
    d) Interrogatories numbered 8(a), (b), (c), (d), (e), (f) & (i) with respect to:
        i. The basis of such belief;
        ii. All enquiries made by the Defendant into that particular matter, including by whom and of whom each enquiry was made, and the response received to it as well as the dates and times the enquiries were made;
        iii. The source or sources of all information on which the belief was founded, and in relation to each such source the Defendant's reasons for regarding it as reliable and accurate.

2. The Defendants application for security for costs filed 21 February 2022 is dismissed with the costs of same to be costs in the cause.

3. The matter is adjourned for pre-hearing conference before the Judicial Registrar on 15 February 2023 at 10.15 am.