Federal Court of Australia

 Kukulka v Google LLC [2020] FCA 1229

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| File number(s): | VID 419 of 2020 |
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| Judgment of: | **ANASTASSIOU J** |
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| Date of judgment: | 25 August 2020 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application to serve originating application seeking preliminary discovery outside Australia pursuant to *Federal Court Rules 2011* (Cth) rr 10.41 to 10.44 – proposed method of service by email – whether the proceeding is of a kind mentioned in r 10.42 – whether the prospective applicant has a prima facie case for all or any of the relief claimed |
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| Legislation: | *Federal Court Rules 2011* (Cth) rr 1.34, 7.22, 10.24, 10.41, 10.42, 10.43, 10.44, 10.49*Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. Opened for signature 15 November 1965. Entered into on 1 November 2010. Articles 5, 10 |
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| Cases cited: | *AIA Australia Ltd v Richards* [2017] FCA 84 *Australian Information Commission v Facebook Inc* [2020] FCA 531 *Hooper v Kirella Pty Ltd* [1999] FCA 1584; (1999) 96 FCR 1*Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116; (2006) 154 FCR 425*Kabbabe v Google LLC* [2020] FCA 126 *Taylor v Network Ten (Perth) Pty Ltd* [1999] WASC 264  |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 26 |
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| Date of hearing: | 10 August 2020  |
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| Solicitor for the Prospective Applicant: | Mr Mark Stanarevic of Matrix Legal |

ORDERS

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|  | VID 419 of 2020 |
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| BETWEEN: | MICHAEL KUKULKAProspective Applicant |
| AND: | GOOGLE LLCRespondent |

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| order made by: | ANASTASSIOU J |
| DATE OF ORDER: | 25 AUGUST 2020 |

THE COURT ORDERS THAT:

1. Pursuant to rr 10.42, 10.43 and 10.44 of the *Federal Court Rules 2011* (Cth) the Prospective Applicant has leave to serve:
	1. the originating application filed on 22 June 2020;
	2. the affidavit of Mark Stanarevic affirmed on 22 June 2020;
	3. the affidavit of Michael Kukulka affirmed on 10 August 2020; and
	4. a copy of this order;

upon the Respondent in the United States of America, by sending it by email to internationalcivil@google.com, conditional upon an acknowledgement of receipt being provided to the Prospective Applicant.

1. The matter is listed for a case management hearing on 30 September at 2:15pm.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ANASTASSIOU J:

# A Introduction

1. The Prospective Applicant, Michael Kukulka, is a professional Gold Dealer and Operations Manager of Melbourne Gold Buyers and Brisbane Gold Buyers, who relies on the internet to attract customers across Australia. He seeks leave to serve an originating application and accompanying documents upon the Respondent, **Google** LLC, which is based in the United States of America, pursuant to Part 10 of the *Federal Court* ***Rules*** *2011* (Cth). The originating application is brought under r 7.22 of the Rules and seeks orders requiring Google to provide preliminary discovery.
2. The preliminary discovery is sought in relation to all documents or things in Google’s possession or control relating to the identity of an unknown person who posted an allegedly defamatory Google review in relation to Mr Kukulka’s business interests, under the name ‘Nick Wood’. The Prospective Applicant seeks this order so that he can identify the party or parties involved in publishing the review and so that he may bring defamation proceedings against that individual or those individuals.
3. For the reasons set out below, I consider it appropriate to grant leave to Mr Kukulka to serve the originating application and accompanying documents on Google under rr 10.42, 10.43 and 10.44 of the Rules by sending those documents by email to Google at internationalcivil@google.com. Nevertheless, I have made an order that service by email is conditional on, and will not be effective until, there is an acknowledgement of receipt by the Respondent.
4. I reach this conclusion notwithstanding that this approach requires me to make an order for substituted service under r 10.24, as service by email would not ordinarily be permitted under r 10.43(3). I consider it appropriate to do so because:
5. the current state of the COVID19 pandemic means that there are delays and impracticalities associated with international registered post, the ordinary method of service relied on in analogous proceedings; and
6. the originating application and accompanying documents are likely to come to the Respondent’s attention, given that Google is a multinational corporation with a history of responding to similar applications at the email identified above.

# B CONSIDERATION

1. Rules 10.43(2) and 10.44(1) provide that a party may apply to the Court for leave to serve an originating application or other document, respectively, on a person in a foreign country in accordance with the “Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters” held at the Hague on 15 November 1965 (the **Hague Service Convention**). Before leave may be granted to serve an originating application or other document on a respondent outside Australia, the Court must be satisfied of four matters set out in r 10.43(3) and (4):
2. the application must be accompanied by an affidavit which states the foreign country where the person is to be served, the proposed method of service and, if the Hague Service Convention applies, that the proposed method of service is permitted by the Hague Service Convention (r 10.43(3));
3. that the Court has jurisdiction in the proceeding (r 10.43(4)(a));
4. that the proceeding is of a kind mentioned in r 10.42 (r 10.43(4)(b)); and
5. that the applicant has a prima facie case for all or any of the relief claimed in the proceeding (r 10.43(4)(c)).
6. In satisfaction of these requirements, the Prospective Applicant relied on orders previously made by this Court in similar applications. For instance, in ***Kabbabe*** *v Google LLC* [2020] FCA 126, Murphy J made orders and gave reasons to the effect that the above requirements were satisfied in analogous circumstances. Justice Murphy made similar orders on 23 April 2020 in proceeding number VID 94 of 2020 (***Garde-Wilson*** *v Google LLC*), though detailed reasons were not provided.
7. The only material difference in the present application is that the Prospective Applicant submitted that it was not presently practicable to effect service on the Respondent by international registered post, due to the current global pandemic, and orders should be made for substituted service by email under r 10.24. For the reasons that follow, I am satisfied that the making of those orders is appropriate, subject to the fact that service will not be deemed effective until the Prospective Applicant obtains an acknowledgement of receipt from the Respondent.

## B.1 Proposed method of service

1. The affidavit of Mr Stanarevic, deposed on 22 June 2020, provides that the Respondent corporation is based in the United States of America and is a party to the Hague Service Convention. The proposed method of service is by email to internationalcivil@google.com, an email which the Respondent has a history of responding to in similar preliminary discovery proceedings arising in this Court.
2. It is undisputed that the Prospective Applicant has leave to serve the relevant documents by international registered post, on the basis that doing so would be compliant with Art 10(a) of the Hague Service Convention: see e.g. *Kabbabe* at [5]-[9] (Murphy J). However, in this instance, the Prospective Applicant submitted that, due to the current global COVID-19 pandemic, there have been delays with the postal service and it would be impracticable to effect service by these means in the rapidly changing global environment. Accordingly, the Prospective Applicant proposes to serve the Respondent by email, relying on the provisions for substituted service in r 10.24. For the reasons that follow, I agree with that approach.
3. In ***AIA Australia*** *Ltd v Richards* [2017] FCA 84, Allsop J at [7] explained that the Hague Service Convention contemplates several mechanisms, or channels, for service. One such channel includes transmission through international registered post: *AIA Australia* at [12]-[13] (Allsop J). However, the Hague Service Convention does not expressly provide for service by email, which is in many ways unexpected given that the Convention dates back to 1965: ***Practical Handbook*** *on the Operation of the Hague Service Convention* (Permanent Bureau of the Hague Conference on Private International Law, 3rd edition at [245]).
4. Of course, technology has evolved since that time and there is overseas jurisprudence which suggests that it may be possible to effect service by email. This includes, for example, situations where service by other means is impossible and there is a reasonable probability that service by email would bring the document to the other party’s attention: see e.g. Practical Handbook at [265]-[268].
5. While I am not satisfied that service by email would necessarily be permitted by the Hague Service Convention in the present circumstances, I need not decide the issue in this application. This is because the Prospective Applicant is applying for substituted service under r 10.24. That rule therefore forms the analytical framework through which to consider whether service is permitted.
6. On its face, r 10.24 appears to provide for substituted service in a domestic context, whereas r 10.49 relates to substituted service outside Australia. These rules differ insofar as substituted service under r 10.49 is only available where an attempted service, in accordance with a convention, the Hague Convention or the law of a foreign country, was not successful. Conversely, r 10.24 applies in circumstances where it is not practicable to serve a document on a person in a way required by the Rules. In any event, it has been held in this Court, in analogous circumstances, that an order for substituted service may be made under either r 10.24 or r 10.49: ***Australian Information Commission v Facebook*** *Inc* [2020] FCA 531 at [66] (Thawley J).
7. I therefore proceed on the same basis as Thawley J in *Australian Information Commission v Facebook*, considering whether it would be impracticable to effect service on Google by international registered post, without substantial difficulty. I consider that it would be, and an order for substituted service should be made under r 10.24, for the following reasons.
8. Firstly, we are in the midst of a global pandemic, where service by international registered post might be substantially delayed or otherwise impractical. While the present state of the pandemic may subside in due course, it is not possible to predict that with any confidence or certainty when that will occur: see e.g. *Australian Information Commission v Facebook* at [75] (Thawley J). To this end, Mr Stanarevic, solicitor for the Prospective Applicant, attests to delays in international certified mail in affidavits dated 22 June 2020 and 17 August 2020, based on his experience in proceedings of a similar nature.
9. Second, I am satisfied that the Respondent has a history of responding to similar requests for preliminary discovery at internationalcivil@google.com and the originating application and accompanying documents are likely to come to the Respondent’s attention. In fact, it seems highly probable, if not certain, that the relevant and necessary people at Google will be made aware of the documents, again for the reasons deposed in the affidavits of Mr Stanarevic referred to above.
10. Third, notwithstanding the views expressed above, I have made service by email conditional upon the Respondent acknowledging it has received the email. This provides a further assurance that service will be validly and properly effected.
11. If there were to be any doubt about the position expressed above as to the suitability of relying on substituted service, I would nevertheless be minded to exercise the discretion afforded to me by r 1.34 of the Rules to dispense with requirements in r 10.43 to otherwise permit service by email, on the conditions I have described above.

## B.2 Court’s jurisdiction in the proceedings

1. It is uncontroversial that this Court has jurisdiction to hear an application for preliminary discovery under r 7.22 of the Rules in a proceeding relating to alleged defamation. The requirement in 10.43(4)(a) is satisfied.

## B.3 Proceeding of a kind mentioned in r 10.42

1. It is similarly apparent that the proceeding is of a kind mentioned in r 10.42, as it is proceeding based on a cause of action arising in Australia. I have reached this conclusion because:
2. the audience of the allegedly defamatory imputation is based in Australia;
3. the Prospective Applicant is an Australian resident and any loss of reputation would be suffered wholly or partly in Australia; and
4. on the balance of probabilities, the google review was published by an Australian resident. I draw this inference because it refers to dealings which must have occurred in Australia.

## B.4 Prima facie case for relief

1. I am also satisfied that there may be a prima facie case for preliminary discovery under r 7.22. Rule 7.22(1) requires that to obtain an order, the Prospective Applicant must satisfy the Court that:
2. there may be a right for the Prospective Applicant to obtain relief against the prospective respondent;
3. the Prospective Applicant is unable to ascertain the description of the prospective respondent, notwithstanding reasonable inquiries having been undertaken in the circumstances; and
4. another person knows, or is likely to know, the description of the prospective respondent, or has, or is likely to have had, control of a document or information that would help ascertain that description: *Hooper v Kirella Pty Ltd* [1999] FCA 1584; (1999) 96 FCR 1 at [31]-[34].
5. It is important to recognise that the obligation on the Prospective Applicant at this stage is not onerous. The Prospective Applicant only needs to show that he *may* have a right to obtain relief for the alleged defamatory imputations. This threshold is reached in the present circumstances, where the identified Google review alleges, by implication, that Mr Kukulka is negligent and unfit to be a Gold Dealer and Operations Manager. While those aspersions are not cast against him personally, they can be attributed to him as a member of a limited class of persons involved with the Melbourne Gold Company and Brisbane Gold Company: *Taylor v Network Ten (Perth) Pty Ltd* [1999] WASC 264 at [10]-[12], [23] (Stone J).
6. I am also satisfied, based on the affidavit of Mr Stanarevic dated 22 June 2020, that Mr Kukulka has made reasonable inquiries with Google and taken other appropriate steps to identify the prospective respondent or respondents, but has been unable to ascertain that description. Those inquiries need not be exhaustive and I am comfortable that Mr Kukulka has made reasonable attempts to have Google remove the review or identify the reviewer: see also *Kabbabe* at [17] (Murphy J).
7. Further, I consider it likely that Google has, or have had, control of a document or thing that would assist the Prospective Applicant to ascertain the description of the prospective respondent, which may include:
8. the subscriber information for an anonymous account under the name ‘Nick Wood’;
9. the name of the users of that account;
10. the IP address or addresses and associated information relating to that account;
11. any phone numbers associated with that account;
12. any location metadata associated with that account; and
13. any other Google accounts including their full name and email address and identifying details which may have originated from the same IP address during a similar time period to when the account was accessed to post the relevant Google review: see also *Kabbabe* at [18] (Murphy J).

## B.5 Residual discretion

1. I note for completeness that the Court retains a residual discretion to refuse relief even where the requirements for service outside Australia are satisfied: *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at [3] (Black CJ and Finkelstein J) cited in *Australian Information Commission v Facebook* at [58] (Thawley J). However, I do not consider that the present circumstances give rise to any basis to refuse leave on discretionary grounds.

# C conclusion

1. Accordingly, I have made orders for the Prospective Applicant to serve the originating application and accompanying documents on the Respondent by email at internationalcivil@google.com, conditional on an acknowledgement of receipt being provided.

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| I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Anastassiou. |

Associate:

Dated: 25 August 2020