FEDERAL COURT OF AUSTRALIA

Unlockd Limited v Google Asia Pacific Pte Limited [2018] FCA 826

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| File number: | VID 628 of 2018 |
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| Judge: | **MOSHINSKY J** |
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| Date of judgment: | 31 May 2018 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for interim injunction pending the hearing and determination of an application for an interlocutory injunction – where the first respondent did not oppose the making of interim orders – where the second respondent had not been served and therefore the application proceeded on an ex parte basis against the second respondent – whether to grant interim relief against the second respondent  **PRACTICE AND PROCEDURE** – service out of jurisdiction – alleged contraventions of the Australian Consumer Law and the *Competition and Consumer Act 2010* (Cth) – whether requirements for service out of the jurisdiction satisfied |
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| Legislation: | *Competition and Consumer Act 2010* (Cth), s 46, Sch 2, Australian Consumer Law, ss 18, 21  *Federal Court Rules 2011*, rr 10.42, 10.43, 10.44 |
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| Cases cited: | *Australian Competition and Consumer Commission v Apple Pty Ltd* [2017] FCA 416  *Australian Competition and Consumer Commission v April International Marketing Services Australia Pty Ltd (No 6)* (2010) 270 ALR 504  *Australian Competition and Consumer Commission v Yellow Page Marketing BV* [2010] FCA 1218  *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* (2015) 331 ALR 108 |
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| Date of hearing: | 31 May 2018 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Regulator and Consumer Protection |
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| Category: | Catchwords |
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| Number of paragraphs: | 54 |
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| Counsel for the First and Second Applicants: | Mr MH O’Bryan QC with Mr DB Bongiorno |
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| Solicitor for the First and Second Applicants: | MinterEllison |
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| Counsel for the First Respondent: | Mr M Borsky QC with Mr G Kozminsky |
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| Solicitor for the First Respondent: | Ashurst |
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| Counsel for the Second Respondent: | The Second Respondent did not appear |

ORDERS

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|  | | VID 628 of 2018 |
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| BETWEEN: | UNLOCKD LIMITED (ACN 169 872 502)  First Applicant  UNLOCKD AU PTY LIMITED (ACN 602 741 284)  Second Applicant  UNLOCKD OPERATIONS PTY LTD (ACN 608 719 375)  Third Applicant | |
| AND: | GOOGLE ASIA PACIFIC PTE LIMITED  First Respondent  GOOGLE LLC  Second Respondent | |

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| JUDGE: | MOSHINSKY J |
| DATE OF ORDER: | 31 MAY 2018 |

**THE COURT NOTES THAT:** The applicants have undertaken:

A. To submit to such order (if any) as the Court may consider to be just for the payment of compensation (to be assessed by the Court or as it may direct) to any person (whether or not that person is a party) affected by the operation of the order or undertaking or any continuation (with or without variation) of the order or undertaking; and

B. To pay the compensation referred to in paragraph A above to the person affected by the operation of the order or undertaking.

**THE COURT ORDERS THAT:**

1. Until 4.00 pm on 29 June 2018 or further order, the first respondent shall not, whether itself or through the agreement or agency of any other company:
   1. take any action, whether directly or indirectly, to terminate or to suspend:
      1. the supply of the Google Play Store service for the purposes of distributing the Flybuy app incorporating the applicants’ Unlockd product to users of the Android operating system in Australia; or
      2. the supply of the Google AdMob service to the applicants for the Flybuy app incorporating the applicants’ Unlockd product in Australia,

on the grounds that the Flybuy app incorporates the applicants’ Unlockd product;

* 1. make any threats, whether itself or through the agreement or agency of any other company, to take any action set out in sub-paragraph (a) above.

2. Until 4.00 pm on 29 June 2018 or further order, the second respondent shall not, whether itself or through the agreement or agency of any other company:

(a) take any action, whether directly or indirectly, to terminate or to suspend:

(i) the supply of the Google Play Store service for the purposes of distributing the Flybuy app incorporating the applicants’ Unlockd product to users of the Android operating system in Australia; or

(ii) the supply of the Google AdMob service to the applicants for the Flybuy app incorporating the applicants’ Unlockd product in Australia,

on the grounds that the Flybuy app incorporates the applicants’ Unlockd product;

(b) make any threats, whether itself or through the agreement or agency of any other company, to take any action set out in sub-paragraph (a) above.

3. Pursuant to rules 10.43(2) and 10.44(1) of the *Federal Court Rules 2011*, the applicants be granted leave to serve:

(a) the originating application dated 30 May 2018;

(b) the affidavit of Glen Ward dated 30 May 2018;

(c) the confidential affidavit of Glen Ward dated 30 May 2018;

(d) the affidavit of Glen Ward dated 31 May 2018; and

(e) a copy of this order,

on the second respondent in the United States of America in accordance with the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* done at the Hague on 15 November 1965.

4. Until further order, on the ground that it is in the interests of the administration of justice, the disclosure (by publication or otherwise) of the Confidential Affidavit sworn by Glen Ward on 30 May 2018 and its annexures (being annexures GBW-11, GBW-12 and GBW-13) is prohibited except for disclosure to the parties to the proceeding or to their legal representatives for the purposes of the proceeding.

5. By 4.00 pm on 7 June 2018, the applicants file and serve any further affidavits on which they will rely in relation to the claim for interlocutory relief.

6. By 4.00 pm on 14 June 2018, the respondents file and serve any affidavits on which they will rely in relation to the claim for interlocutory relief.

7. By 4.00 pm on 19 June 2018, the applicants file and serve any affidavits in reply and any supplementary outline of submissions on the application for interlocutory relief.

8. By 4.00 pm on 22 June 2018, the respondents file and serve an outline of submissions on the application for interlocutory relief.

9. The applicants’ claim for interlocutory relief be set down for hearing during the week of 25 June 2018 on an estimate of 2 days.

10. The hearing of the proceeding be expedited.

11. There be liberty to apply.

12. Costs be reserved.

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

REASONS FOR JUDGMENT

MOSHINSKY J:

## Introduction

1. The applicants (**Unlockd**) produce an application or ‘app’ for consumers to use on their Google Android mobile devices in Australia and other countries including the United Kingdom and the United States of America. The Unlockd app is commercially dependent on the supply by the respondents of two services, known as “Google Play Store” and “AdMob”. The respondents have threatened to terminate the supply of those services with respect to the Unlockd app from 1 June 2018.
2. The applicants have filed an originating application dated 30 May 2018 seeking interlocutory and final relief against the respondents. Among other things, the originating application seeks orders enjoining the respondents from terminating the supply of the two services referred to above.
3. Unlockd seeks urgent interim orders preventing the first respondent (**Google Asia Pacific**) and the second respondent (**Google LLC**) (whether themselves or through the agreement or agency of any other Google company) from terminating the supply of the Google Play Store for the purposes of distributing the Unlockd app to users of the Android operating system in Australia or the supply of AdMob services in Australia in connection with the use of the Unlockd app in Australia, pending the hearing and determination of the application for interlocutory relief.
4. The applicants have served the originating application and the affidavits in support of the application for interim relief on Google Asia Pacific but not Google LLC. Google LLC is based in the United States of America. The solicitors acting for Google Asia Pacific do not, at this stage, have instructions to accept service on behalf of Google LLC, and the applicants have not otherwise been able to effect service on Google LLC. The applicants accordingly seek leave to serve the originating process and ancillary documents on Google LLC out of the jurisdiction, in the United States of America. It follows that, insofar as the applicants seek interim relief against Google LLC, this part of the application is made on an ex parte basis.
5. At the hearing of the application this morning, there was, ultimately, no issue between the applicants and Google Asia Pacific as to the grant of interim relief or the terms of that relief. Accordingly, and in circumstances where the applicants have given the usual undertaking as to damages, I will make an order in the following terms:

1. Until 4.00 pm on 29 June 2018 or further order, the first respondent shall not, whether itself or through the agreement or agency of any other company:

a. take any action, whether directly or indirectly, to terminate or to suspend:

i. the supply of the Google Play Store service for the purposes of distributing the Flybuy app incorporating the applicants’ Unlockd product to users of the Android operating system in Australia; or

ii. the supply of the Google AdMob service to the applicants for the Flybuy app incorporating the applicants’ Unlockd product in Australia,

on the grounds that the Flybuy app incorporates the applicants’ Unlockd product;

b. make any threats, whether itself or through the agreement or agency of any other company, to take any action set out in sub-paragraph (a) above.

1. I will also make timetabling orders as regards the hearing of the interlocutory injunction application. There was no dispute about these orders. I will also make an order expediting the trial of the proceeding. I note for completeness that, although the above order is framed in terms of the “Flybuy app” (further explained below), the applicants may wish to seek an injunction in broader terms upon the hearing of their application for an interlocutory injunction.
2. It remains to consider the applicants’ application for leave to serve the originating application and ancillary documents on Google LLC out of the jurisdiction, and for interim injunctive relief against Google LLC.

## Background facts

1. The following summary of the background facts is based on the applicants’ affidavit material. These facts and matters may, of course, be subsequently challenged.

### Google LLC

1. Google LLC is a large multinational company that, together with or through its related companies, supplies a range of online related services including:
   1. the Google search engine;
   2. the Android mobile device operating system;
   3. the Google Play Store, which is an online store from which users of Android mobile devices can acquire apps developed by third parties for use on their mobile device; and
   4. the AdMob service, which is an advertising intermediation service for the display or publication of advertisements on mobile devices, and which sources advertising for that purpose.
2. Google LLC generates most of its revenues from online advertising (the publication of advertisements online). In 2017, its advertising revenues amounted to more than US$95 billion.
3. The services supplied by Google LLC are more fully described in the witness statement of Professor Geradin (an annexure to the affidavit of Glen Ward dated 30 May 2018).

### Unlockd app

1. Since 2014, Unlockd has developed an app that operates on Google Android mobile devices, incorporating patented technology. It launched its app in 2015.
2. Unlockd’s offering involves providing an innovative mobile advertisement service, through its app, that rewards smartphone users for their time and attention. Users opt-in, by electing to download the app, registering and agreeing to Unlockd’s Terms of Use, to receive full screen mobile advertisements and content at the time they ‘unlock’ their mobile device. In return for their attention, the user receives rewards such as loyalty points or mobile phone credits, provided by Unlockd’s commercial partner for the relevant app. Upon unlocking their device, the user may either dismiss the advertisement or content, by clicking an “x” in the top right-hand corner, or may elect to click on the advertisement or content (and go through to a landing page). Users who opt-in to the Unlockd app complete the registration process by identifying categories of interest to them, and Unlockd target advertisements and content to each user. The app also offers additional user engagement functionality (for example, by taking surveys or watching videos) to earn additional rewards.
3. The Unlockd app is currently offered in a number of countries, including Australia, the United States and the United Kingdom. Primarily, the app is offered by Unlockd in conjunction with commercial partners under arrangements that are commonly described as “white label”. This means that the particular app is branded in the style of, and is customised to, Unlockd’s partner. In Australia, Unlockd’s major partner is Flybuys, a loyalty scheme managed by Loyalty Pacific Pty Ltd (**Loyalty Pacific**). In the United Kingdom, Unlockd’s major partner is Tesco Mobile. In the United States, Unlockd’s major partner is Boost Mobile, part of the Sprint group. Under the white label arrangements, users (who have downloaded and opted in to the app) receive rewards from the commercial partner.

### Unlockd investment and employees

1. Unlockd was founded in June 2014. It currently has 59 employees located throughout the world, 38 of whom are located in Australia.
2. Unlockd has raised several tranches of capital to fund its commercial development.
3. Unlockd had planned to launch an initial public offering in Australia in April or May 2018, but that has now been postponed by reason of the events giving rise to this proceeding.

### Google Play Store and AdMob

1. The Unlockd app has been commercially developed to use, and currently uses, two services supplied by the Google group of companies: Google Play Store and AdMob.
2. Google Play Store is a digital distribution service offering digital products, including apps, for consumers using Google Android smart phones. App developers make their apps available for download via the Google Play Store, which is preloaded on and appears on the home page of most Android devices. All of Unlockd’s 120,000 activations of the Unlockd Flybuys app in Australia have been downloaded from the Google Play Store. Google Play is the largest Android app store in the world and is commercially essential to the distribution of the Unlockd Flybuys app to users of Android devices in Australia.
3. Anyone wishing to offer an app via the Google Play Store must agree to the terms of the “Google Play Developer Distribution Agreement”, which includes a term by which the provider of the app must agree to adhere to the “Developer Program Policies”. Unlockd’s Flybuys app is distributed through the Google Play Store through its partner, Loyalty Pacific, which has agreed to the terms of the “Google Play Developer Distribution Agreement”.
4. According to the Google Play Store online terms and conditions, access to the Google Play Store is supplied in Australia by Google Asia Pacific. However, the evidence available to Unlockd at this time indicates that Google Asia Pacific provides that service as an agent of Google LLC and that decisions as to the terms on which the Google Play Store is supplied to app developers, and decisions as to whether particular apps will be permitted to be distributed through the Google Play Store, are made by Google LLC.
5. AdMob is a Google service through which app developers such as Unlockd can earn revenue through the publication of advertisements in conjunction with their apps. AdMob provides an intermediation service which aggregates advertisement ‘inventory’ from different advertisers and offers the advertisements to app developers to publish to consumers in conjunction with the developer’s app. Advertisers pay Google for the use of the AdMob service based on the number of ‘impressions’ of their advertisement on mobile devices (the number of times the advertisement is displayed to a user) and/or the number of ‘clicks’ on their advertisement on mobile devices (the number of times a user clicks on the advertisement). In turn, Google shares a proportion of that payment with app developers. In that way, app developers receive revenue for publishing the advertisements through the use of the app on a mobile device. Approximately 87 per cent of advertisements appearing on the Unlockd Flybuys app are sourced from AdMob.
6. Anyone wishing to obtain advertisements through the AdMob service must agree to the “AdSense Online Terms of Service”, which include a term by which the app developer must agree to adhere to the “AdMob Publisher Guidelines and Policies”. The second applicant, Unlockd AU Pty Limited, has agreed to those terms in order to receive the AdMob service with respect to the Unlockd Flybuys app.
7. According to the AdMob online terms and conditions, AdMob is supplied in Australia to Unlockd by Google Asia Pacific. However, the evidence available to Unlockd at this time indicates that decisions as to the terms on which the AdMob service is supplied to app developers are made by Google LLC.

### Google’s conduct

1. Google Asia Pacific (either in its own right or as agent of Google LLC) has threatened to withdraw access to the Google Play Store in respect of the Unlockd app and terminate the supply of the AdMob service to Unlockd, globally including in Australia.
2. The threat was communicated by a letter dated 2 March 2018, which alleged that the Unlockd app contravenes one of the Google Play Store “Developer Program Policies” and three of the “AdMob Publisher Guidelines and Policies”.
3. The threat was the catalyst for urgent interlocutory relief in the United Kingdom, which has been granted, but does not extend to Australia.
4. Subsequent correspondence between the solicitors for the parties resulted in Google Asia Pacific and/or Google LLC indicating that it or they would terminate the services with effect from 1 June 2018.
5. Should Unlockd be excluded from distributing its app through the Google Play Store, and should it cease to be supplied with AdMob services, it is likely that the Unlockd business, in Australia and globally, will cease to exist.

## Overview of the applicants’ case

### Parties

1. Google Asia Pacific is identified in Google’s online terms and conditions as the supplier of the Google Play Store service and the AdMob service in Australia. The threatened termination of supply therefore involves, at least, that company.
2. The applicants contend that the relevant decisions about the application of Google’s policies, and the decision whether to supply or terminate supply, appear to have been made by Google LLC. The applicants contend that Google LLC is carrying on business in Australia for the supply of each of the Google Play Store and AdMob services in Australia through the agency of its related company, Google Asia Pacific. The applicants also contend that the conduct engaged in by Google LLC is in trade or commerce, within the meaning of the Australian Consumer Law (being Sch 2 to the *Competition and Consumer Act 2010* (Cth)), by reason that it is making relevant decisions concerning the supply of the Google Play Store service and the AdMob service in Australia.
3. In the section that follows, a reference to “Google” is a reference to Google Asia Pacific or Google LLC or both of them.

### Causes of action

1. The applicants contend that Google’s conduct contravenes ss 18 and 21 of the Australian Consumer Law and s 46 of the *Competition and Consumer Act*.
2. In respect of s 18 of the Australian Consumer Law, the applicants contend that Google’s conduct caused Unlockd to believe that its app was compliant with the Google Play Store “Developer Program Policies” and the “AdMob Publisher Guidelines and Policies”, and that Google had confirmed compliance. The applicants contend that Google engaged in conduct including:
   1. from about October 2015, acceptance of various Unlockd apps on the Google Play store;
   2. from November 2016, the provision of the AdMob service for the purposes of Unlockd apps;
   3. in June 2017, in discussions between representatives of Unlockd and Google, confirmation by Google that Unlockd’s app was not in violation of AdMob policies;
   4. in mid-July 2017, following discussions between representatives of Unlockd and Google regarding provision of AdMob services for the Unlockd app, confirmation by Google that it had “validated everything internally”;
   5. in October 2017, following the issue by Google of an AdMob policy violation report and a subsequent successful appeal by Unlockd, confirmation by Google that the issue had been resolved including re-enabling of AdMob services in Australia and discontinuation of a proposed disabling of AdMob services to Unlockd in the United Kingdom and the United States.
3. In respect of s 21 of the Australian Consumer Law, the applicants contend that Google’s conduct in now threatening to terminate the supply of the Google Play Store service and the AdMob service to Unlockd apps is unconscionable. The applicants rely on the following contentions:
   1. Google is a dominant supplier of app store services for Android mobile devices through the Google Play Store and for advertising intermediation services for mobile devices through AdMob in Australia.
   2. The terms and conditions on which Google supplies both the Google Play Store service and the AdMob service are standard terms and conditions and there is no opportunity for Google customers to negotiate those terms and conditions.
   3. Google knows or ought to know that the commercial viability of the Unlockd app is dependent on the app being distributed through the Google Play Store and the provision of AdMob services to the Unlockd app.
   4. In the period from October 2015 to January 2018, Google engaged in the conduct (referred to above) leading Unlockd to believe that its app complied with all Google policies applicable to both the Google Play Store and AdMob, and make investment decisions, employ staff, develop its product and raise capital based on that belief.
   5. Google is treating Unlockd in an inconsistent and discriminatory manner in comparison to other apps for Android mobile devices that use the Google Play Store and/or AdMob services. For example, lock screen apps display advertisements on the lock screen of the mobile device, which is broadly similar functionality to the Unlockd app (for the purposes of Google’s policies).
   6. Google has refused to engage in any meaningful and reasonable dialogue with Unlockd about the application of its Google Play Store and AdMob policies to the Unlockd app. In the case of the Google Play Store, Unlockd launched its app in October 2015 but was informed of an alleged policy compliance issue in March 2018, and told that the Google Play Store team would reach out to discuss the issue. This never occurred.
4. The applicants contend that Google’s proposed conduct would contravene s 46 of the *Competition and Consumer Act*, as recently amended. The applicants rely on the following contentions:
   1. Google, together with its related bodies corporate, is a corporation that has a substantial degree of power in many Australian markets including but not limited to:
      1. internet search engines;
      2. online advertising (the publication of advertising online in the course of internet searches and the use of online apps such as YouTube);
      3. online advertising intermediation services (the sourcing and supply of advertising inventory to online publishers including particularly app developers);
      4. operating systems for mobile devices; and
      5. app store services for Android mobile devices.

(b) The Unlockd app is an online advertising publication service for Android mobile devices. The Unlockd app is an innovative new entrant for the online publication of advertising content on mobile devices. Since its inception, it has grown rapidly and has become an active competitor for and with respect to online advertising.

(c) Advertising on mobile devices is a rapidly growing segment of the online advertising market. It affords effective and vigorous competition to other forms of online advertising, including in the course of internet searches.

(d) Google’s proposed conduct, terminating the supply of the Google Play Store and AdMob services in conjunction with Unlockd apps in Australia, has a substantial purpose or has or is likely to have the effect of substantially lessening competition in one or more markets in Australia comprising:

(i) the publication of advertisements on Android mobile devices;

(ii) the publication of advertisements on mobile devices; and/or

(iii) the publication of advertisements online.

(e) Google or its related bodies corporate supply services in each of those markets.

(f) A substantial anti-competitive purpose of Google’s conduct as referred to above can be inferred from the effect of the conduct and from the circumstances in which the conduct has been engaged in, in defiance of reasonable and ethical commercial behaviour.

## Service out – Applicable principles

1. Rule 10.43 of the *Federal Court Rules 2011* relevantly provides:

(2) A party may apply to the Court for leave to serve an originating application on a person in a foreign country in accordance with a convention, the Hague Convention or the law of the foreign country.

(3) The application under subrule (2) must be accompanied by an affidavit stating:

(a) the name of the foreign country where the person to be served is or is likely to be; and

(b) the proposed method of service; and

(c) that the proposed method of service is permitted by:

(i) if a convention applies — the convention; or

(ii) if the Hague Convention applies — the Hague Convention; or

(iii) in any other case — the law of the foreign country.

(4) For subrule (2), the party must satisfy the Court that:

(a) the Court has jurisdiction in the proceeding; and

(b) the proceeding is of a kind mentioned in rule 10.42; and

(c) the party has a prima facie case for all or any of the relief claimed in the proceeding.

1. Rule 10.42 relevantly provides:

Subject to rule 10.43, an originating application, or an application under Part 7 of these Rules, may be served on a person in a foreign country in a proceeding that consists of, or includes, any one or more of the kinds of proceeding mentioned in the following table.

…

12 Proceeding based on a contravention of an Act that is committed in Australia

…

14 Proceeding in relation to the construction, effect or enforcement of an Act, regulations or any other instrument having, or purporting to have, effect under an Act

15 Proceeding seeking any relief or remedy under an Act, including the *Judiciary Act 1903*

1. Rule 10.44 relevantly provides:

(1) A party may apply to the Court for leave to serve a document filed in or issued by the Court, other than an originating application, on a person in a foreign country in accordance with a convention, the Hague Convention or the law of the foreign country.

…

(2) An application under subrule (1) must be accompanied by an affidavit that includes the information mentioned in paragraphs 10.43(3)(a) to (c).

1. I discussed the applicable principles in *Australian Competition and Consumer Commission v Apple Pty Ltd* [2017] FCA 416. For ease of reference, I incorporate that discussion below.
2. Rule 10.43(4)(c) refers to the party having a prima facie case for all or any of the relief claimed in the proceeding. This requirement has been described as “not particularly onerous”: *Australian Competition and Consumer Commission v Yellow Page Marketing BV* [2010] FCA 1218 (***Yellow Page Marketing***) at [25] per Gordon J. In *Australian Competition and Consumer Commission v April International Marketing Services Australia Pty Ltd (No 6)* (2010) 270 ALR 504, Bennett J said in relation to the predecessor provision (at [8]):

Establishing a prima facie case for the relief claimed for the purposes of O 8 r 3(2) of the FCR should not call for a substantial inquiry. A prima facie case is made out where, upon a broad examination rather than an intense scrutiny of the material before the court, inferences are shown to be open which, if translated into findings of fact, would support the relief claimed: *Western Australia v Vetter Trittler Pty Ltd (in liq) (rec and mgr apptd)* (1991) 30 FCR 102 at 110; 4 ACSR 795 at 802–3 per French J; *Sydbank Soenderjylland (A/S) v Bannerton Holdings Pty Ltd* (1996) 68 FCR 539 at 549; 149 ALR 134 at 142–3; the Full Court in *F Hoffman-La Roche* at [17] and [96]–[97] per Carr J. The relevant question was put in the following terms by Lee J in *Century Insurance (in prov liq) v New Zealand Guardian Trust Ltd* [1996] FCA 376, a formulation approved by the Full Court (in *Ho v Akai Pty Ltd (in liq)* [2006] FCAFC 159 at [10] (*Ho*)):

What the court must determine is whether the case made out on the material presented shows that a controversy exists between the parties that warrants the use of the court’s processes to resolve it and whether causing a proposed respondent to be involved in the litigation in the court in Australia is justified.

1. The applicant need only show a prima facie case in respect of part of, rather than the entirety of, its claim: *Yellow Page Marketing* at [25].
2. The Court has residual discretion to refuse leave to serve out even if the requirements of the above rules have been met: *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* (2015) 331 ALR 108 at [66] per Edelman J and cases there cited.

## Service out – consideration

1. I will start with r 10.43(3), which requires the application for leave to serve out to be accompanied by an affidavit setting out certain matters. The applicants rely on an affidavit of Glen Ward dated 31 May 2018. This sets out: the name of the country where the person to be served (Google LLC) is or is likely to be; the proposed method of service; and that the proposed method of service is permitted by the Hague Convention.
2. Turning then to the requirements of r 10.43(4), I am satisfied that each of these requirements is satisfied. First, the Court has jurisdiction in the proceeding. This is conferred by the legislation relied on by the applicants. Secondly, the proceeding is of a kind mentioned in r 10.42. In particular, it is of a kind mentioned in items 12, 14 and 15 in the table appearing at r 10.42.
3. Thirdly, in my view, the applicants have a prima facie case for the relief claimed against Google LLC. I refer to the background facts set out above. I refer also to annexures “GBW-8” and “GBW-9” to Mr Ward’s affidavit of 30 May 2018 (being the non-confidential affidavit of that date). These documents provide prima facie evidence that Google Asia Pacific was acting as the agent of Google LLC in relation to at least part of the relevant conduct.
4. It follows that the preconditions for making an order for service out of the jurisdiction are established. In my view, it is appropriate in the circumstances to make such an order. The allegations against the two respondents are closely intertwined. It is desirable that the claims against both respondents proceed together in the one proceeding. Moreover, a controversy exists that warrants the use of the Court’s processes to resolve it and justifies the involvement of the foreign respondent.
5. Accordingly, I will make an order for service out of the jurisdiction on Google LLC.

## Interim relief against Google LLC

1. In my view, on the basis of the background facts referred to earlier, there is a serious question to be tried in relation to the allegations against Google LLC. Further, and in circumstances where all that is sought at this stage is an interim injunction until the hearing and determination of the application for interlocutory relief, I consider that the balance of convenience favours the grant of an interim injunction in substantially the same terms as agreed to by Google Asia Pacific.
2. The Unlockd app has been distributed through the Google Play Store since October 2015 and the applicants have used AdMob services since November 2016.
3. On the basis of the material presently before the Court, there is no realistic prospect of harm to Google LLC from the grant of interim relief. Indeed, Google Asia Pacific or Google LLC will continue to earn a revenue share from AdMob supplied advertisements that are published through the Unlockd apps.
4. Conversely, if Google Asia Pacific or Google LLC proceeds to terminate the supply of the Google Play Store service and AdMob services with respect to Unlockd, Unlockd would immediately lose:
   1. the only means by which the Unlockd app is currently distributed to and can be accessed by users, being the Google Play Store; and
   2. access to a commercially essential source of advertising content for its apps, and through which it derives most of its revenue for publishing advertisements in conjunction with the app.
5. Further, if Unlockd is ultimately successful in its claims, damages would or may not be an adequate remedy. If Google Asia Pacific or Google LLC terminates supply of the Google Play Store and/or AdMob services, Unlockd is unlikely to remain in existence, which may cause: (a) employees in Australia and globally to lose their jobs; (b) the substantial investment that has been made in the business (in Australia and globally) to be lost; and (c) a pipeline of commercial partnerships and future opportunities (in Australia and globally) to be lost.
6. Accordingly, I will grant an interim injunction against Google LLC in substantially the same terms as agreed to by Google Asia Pacific.

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| I certify that the preceding fifty-four (54) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Moshinsky. |

Associate:

Dated: 5 June 2018