Federal Court of Australia

Saffari v Amazon.com Inc [2022] FCA 535

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| File number: |  |
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| Judgment of: | **CHEESEMAN J** |
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| Date of judgment: | 12 May 2022 |
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| Catchwords: | **PRACTICE AND PROCEDURE –** service – where the application for leave to appeal in respect of two interlocutory decisions of the Federal **Circuit Court** of Australia (now the Federal Circuit and Family Court of Australia) - where applicant is self-represented – where the first respondent (**Amazon**) is a foreign company based in the United States of America – where the second respondent, Jeffrey Bezos, one of 17 governors of Amazon, is outside the jurisdiction – where the applicant contends that service on the legal representatives of the fourth respondent in Australia, Amazon Commercial Services Pty Ltd, an Australian subsidiary of Amazon, is effective service on Amazon and Mr Bezos – whether service may be deemed pursuant to  r 10.48(b) of the *Federal Court Rules 2011* (Cth) – whether service has been effected – whether service may be deemed - Held: application dismissed.  **PRACTICE AND PROCEDURE –** where applicant seeks an order for default judgment against Amazon and Mr Bezos for the relief in the statement of claim filed in the Circuit Court – where applicant contends that Amazon and  Mr Bezos are in default as they are aware of the proceedings by reason of having the relevant Court documents in their possession – whether orders entering default judgment should be made – Held: application dismissed.  **PRACTICE AND PROCEDURE –** where applicant seeks alternative relief in the form of: first, substituted service orders and second, an order for service to be effected in accordance with the methods available under the Hague Convention pursuant to Division 10.4 of the *Federal Court Rules 2011* (Cth) – whether relief as to the mode of service should be granted where the applicant has not sought leave to serve out of Australia under r 10.43(2) of the *Federal Court Rules 2011* (Cth) - Held: application dismissed. |
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| Legislation: | *Corporations Act 2001* (Cth), ss 9, 109X  *Federal Circuit Court of Australia Act 1999* (Cth), s 17A  *Federal Court of Australia Act 1976* (Cth), ss 24(c), 24(1A), 24(1D)(ca), 37M  *Federal Circuit Court Rules 2011* (Cth), rr 6.17, 13.10  *Federal Court Rules 2011* (Cth), rr 10.23, 10.24, 10.43, 10.48, 10.49, 35.11(a), 35.12, 35.15, 35.16 |
|  |  |
| Cases cited: | *Australian Competition and Consumer Commission v Yazaki Corporation (No 2)* [2015] FCA 1304;332 ALR 396  *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; 262 FCR 243  *Dometic Australia Pty Ltd v Houghton Leisure Products* [2018] FCA 1573; 135 IPR 403  *Federal Commissioner of Taxation v Zeitouni* [2013] FCA 1011; 306 ALR 603  *Kosmos Capital Pty Ltd v Turiya Ventures LLC* [2019] FCA 528  *Pollis v Zombor* [2019] FCA 856  *Ross v Cotter* [2015] FCA 310  *Saffari v Amazon.com Inc* [2021] FCCA 340  *Saffari v Amazon.com Inc (No 2)* [2021] FCCA 341  *Sanum Investments Limited v ST Group Co Ltd (No 2)* [2019] FCA 1047 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 85 |
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| Date of hearing: | Determined on the papers |
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| Counsel for the Applicant: | The applicant provided written submissions only. |
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| Counsel for the Fourth Respondent: | A J Byrne (written submissions only) |
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| Solicitor for the Fourth Respondent: | Dentons Lawyers |

ORDERS

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|  | | NSD 195 of 2021 |
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| BETWEEN: | SHAHRIAR SAFFARI  Applicant | |
| AND: | AMAZON.COM INC  First Respondent  JEFFREY BEZOS  Second Respondent  BOYD THIBODEAUX (and another named in the Schedule)  Third Respondent | |

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| order made by: | CHEESEMAN J |
| DATE OF ORDER: | 12 May 2022 |

THE COURT ORDERS THAT:

1. The applicant’s interlocutory application filed on 20 August 2021 is dismissed with costs.

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

REASONS FOR JUDGMENT

CHEESEMAN J:

# Introduction

1. The substantive proceedings are an application for leave to appeal from two interlocutory decisions of the Federal **Circuit Court** of Australia (now the Federal Circuit and Family Court of Australia): *Saffari v Amazon.com Inc* [2021] FCCA 340 (**PJ**) and *Saffari v Amazon.com Inc (No 2)* [2021] FCCA 341 (**PJ2**) (the **leave proceedings**). I refer to the proceedings below in these reasons as the **Circuit Court proceedings**.
2. Mr Saffari was the applicant in the Circuit Court proceedings. Mr Saffari’s underlying complaint in the Circuit Court proceedings arises from the removal of his self-published book *"redacted* [the Book]*"* from the Amazon Kindle website following a third party complaint that the book contained defamatory content. Amazon Kindle is an online platform on which consumers can purchase electronic books. Mr Saffari self-published his book anonymously using a service offered by Kindle. A central issue of concern for Mr Saffari is that his name and contact details were provided to the third party complainant by Amazon. He contends that this was, amongst other things, a breach of his privacy.
3. The parties below and in this Court are as follows.
4. Shahriar Saffari is the applicant. He is self-represented. During the course of the leave proceedings the Court made enquiries in an attempt to secure pro-bono legal assistance for Mr Saffari. Those enquires were not fruitful.
5. There are four respondents. **Amazon**.com Inc, is a foreign corporation under the ***Corporations Act*** *2001* (Cth). Amazon is registered in the United States of America (**USA**) as a foreign profit corporation. It was incorporated in Delaware, USA. It has its principal office in Seattle, Washington, USA. It has a registered agent, with an address in Tumwater, Washington, USA. Amazon is the first respondent. Jeffrey Bezos, the founder of Amazon and one of the 17 governors of the company, is the second respondent. Mr Bezos appears to be located outside Australia. Boyd Thibodeaux is described as a “CreateSpace” customer relations executive and is the third respondent. Rocco Braeuniger, a former director of Amazon Commercial Services Pty Ltd (**ACS**) (between September 2017 and October 2019), is the fourth respondent. Mr Braeuniger is the only respondent who has appeared in the leave proceedings and was the only respondent who appeared in the Circuit Court proceedings. In both proceedings he has been represented by **Dentons** Lawyers.
6. ACS was registered in Victoria in January 2017, and has 523,601 fully paid ordinary shares on issue, all held (legally and beneficially) by Amazon.com Sales, Inc., a company based in Delaware, USA. An ASIC search describes Amazon as ACS’s ultimate holding company. There is no evidence before the Court of the structure of the shareholdings between Amazon.com Sales, Inc. and Amazon or as to any interrelationships between the directors and officeholders or management of ACS, Amazon.com Sales, Inc. and Amazon. ACS is not a party to the leave proceedings and was not a party to the Circuit Court proceedings.
7. These reasons concern an interlocutory application by Mr Saffari in the leave proceedings. Part of the interlocutory relief that Mr Saffari seeks is for the Court to rule on various issues related to whether he has, or should be deemed to have, effected service of the leave proceedings on Amazon and Mr Bezos. If the Court determines that service has been, or should be deemed to have been, effected, then Mr Saffari seeks an order for judgment against Amazon and Mr Bezos for the relief claimed in the statement of claim filed in the Circuit Court based on what he contends are their respective failures to file a defence in that court. If the Court determines that service has not been effected on Amazon and Mr Bezos, Mr Saffari seeks in the alternative, orders for substituted service or orders for service 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 (**Hague Convention**) pursuant to Division 10.4 of the *Federal Court* ***Rules*** *2011* (Cth).
8. Mr Saffari has not at any stage obtained leave to serve Amazon and Mr Bezos under r 10.43(2) of the Rules in the leave proceedings. He does not include a prayer directed to obtaining leave to serve out of the jurisdiction in the interlocutory application that is before the Court. During the case management hearings of the leave proceedings, Mr Saffari expressed concern that to apply for leave to serve out in the leave proceedings may adversely affect the Court’s assessment of whether he had effected valid service on Amazon and Mr Bezos in the Circuit Court.
9. Mr Saffari also seeks as part of the interlocutory relief on this application that evidence obtained from the Office of the Australian Information Commissioner (**OAIC**) be “allowed”. It appears that Mr Saffari contends that this material is relevant to the issue of whether Amazon and Mr Bezos are aware of the leave proceedings and/or the Circuit Court proceedings and notwithstanding their respective awareness of both proceedings they have elected not to participate in either proceeding. Mr Saffari points to a letter from Amazon addressed to Justin Lodge, assistant director of the dispute resolution branch of the OAIC undated but forwarded by email dated 11 May 2021 by Jeff Morneau, Associate General Counsel, Amazon (the **Morneau Letter**). The letter addresses Amazon’s position in relation to why Mr Saffari’s privacy complaint before the OAIC (**OAIC investigation**) should not proceed by way of conciliation. Relevant for present purposes from Mr Saffari’s perspective is that the Morneau Letter sets out a short summary of the Circuit Court proceedings including the orders made by his Honour Judge Street and includes a copy of a statement of claim filed by Mr Saffari on 20 January 2020, and copies of what is described as the “appeal in the Federal Court” and the “amended appeal application”.
10. No part of the relief sought by Mr Saffari on this interlocutory application is directed to   
    Mr Thibodeaux or Mr Braeuniger.

# Background

## Circuit Court proceedings

1. Mr Saffari, who has been self-represented throughout, commenced proceedings against the respondents in the Circuit Court on 31 July 2019. Amazon, Mr Bezos and Mr Thibodeaux did not at any time appear in the Circuit Court proceedings. As noted above, Mr Braeuniger appeared in the Circuit Court proceedings and his solicitors, Dentons, filed an address for service in those proceedings.
2. The proceedings appear to have been first allocated to his Honour Judge Dowdy. Pursuant to an order of Judge Dowdy on 27 September 2019, Mr Saffari filed a document styled as "draft statement of claim". Then, on 20 January 2020, without leave, Mr Saffari filed a document styled as “statement of claim”. This document annexed various documents including primary documents, such as emails and printed copies of webpages.
3. Mr Saffari’s claims against the respondents were variously expressed as claims for breaches of contract, competition law, privacy law and tortious duty related to the withdrawal of his self‑published book from the Amazon Kindle platform.
4. At some point the proceedings came to be listed before his Honour Judge Street. The Circuit Court proceedings appear to have been fixed for hearing on 24 February 2021 of Mr Saffari’s application for summary judgment against Mr Braeuniger (which had been filed on 18 February 2021) and of the application for summary dismissal by Mr Braeuniger (which had been filed on 31 October 2019).
5. The hearing on 24 February 2021 before Judge Street culminated in two sets of orders being made with two separate reasons for judgment being delivered. By those orders, Judge Street dismissed the proceedings commenced by Mr Saffari against Amazon, Mr Bezos and Mr Thibodeaux (PJ) and against Mr Braeuniger (PJ2).
6. The proceedings against Amazon, Mr Bezos and Mr Thibodeaux were dismissed on the basis that the proceedings had not been served within 12 months as required by r 6.17 of the *Federal* ***Circuit Court Rules*** *2001* (Cth) and accordingly the proceedings were stale as against Amazon, Mr Bezos and Mr Thibodeaux. Judge Street noted that Mr Saffari believed that he had taken steps to effect service but found that the steps taken by Mr Saffari were not in accordance with the relevant rules. Judge Street declined to extend the time for the validity of the “application”.
7. Later on the same day, Judge Street made further orders which included, first, an order refusing an oral application by Mr Saffari for leave to amend what was described as the proposed amended statement of claim and second, an order summarily dismissing the proceedings against Mr Braeuniger pursuant to s 17A of the *Federal Circuit Court of Australia Act 1999* (Cth) and r 13.10 of the Circuit Court rules. Mr Braeuniger was represented by counsel at the hearing on 24 February 2021.

## Application for leave to appeal

1. Mr Saffari commenced proceedings in this Court by filing an application for leave to appeal and a supporting affidavit on 10 March 2021 (the **leave documents**). The leave documents did not include a copy of the judgments in respect of which leave to appeal is sought as required under rr 35.12(2)(a) and (b) and 35.15 of the Rules. Mr Saffari annexed the orders made by Judge Street dismissing the proceedings as against Amazon, Mr Bezos and Mr Thibodeaux but not the orders dismissing the proceedings against Mr Braeuniger to his application seeking leave to appeal. Mr Saffari filed an amended application on 12 April 2021. The amended application makes reference to but does not annex documents including an order of Judge Street dated 24 February 2021 and a transcript of the hearing before Judge Street on 24 February 2021. There is no evidence before the Court that suggests that a version of the amended application, other than the version filed, has been served that is compliant with the requirements in rr 35.12(2)(a) and (b) and 35.15 of the Rules.

## Service of leave documents

1. Mr Saffari has filed evidence setting out the steps on which he relies to show that he has served, or should be deemed to have served, Amazon and Mr Bezos with the leave documents.
2. There is no dispute that notwithstanding the failure to include all the documents required to be served under rr 35.12(2)(a)-(b) and 35.15 of the Rules, Mr Braeuniger has lodged an address for service in the leave proceeding. On 12 March 2021, a process server engaged by Mr Saffari handed a copy of the leave documents to a person at the offices of Dentons, the solicitors acting for Mr Braeuniger. Dentons subsequently filed and served a notice of address for service on 24 March 2021 stating that Mr Braeuniger’s address for service in these proceedings is the offices of Dentons.
3. On 15 March 2021, the same process server, again engaged by Mr Saffari, delivered the leave documents to a person at the registered office address of ACS and said “Are you authorised to accept service of these documents I now show you on behalf of Amazon Commercial Services Pty Ltd?”, in response to which the person said “Yes, I am”. As noted above, ACS is not a party to the leave proceedings and was not a party to the Circuit Court proceedings. It will be recalled that Mr Braeuniger was for a period a director of ACS.
4. The remaining three respondents, Amazon, Mr Bezos and Mr Thibodeaux have not filed an address for service in the leave proceedings. A live issue on the interlocutory application is whether the steps taken by Mr Saffari have resulted in service of the leave documents on Amazon and Mr Bezos or should be deemed to have resulted in service.
5. As noted above, no part of the relief sought by Mr Saffari is directed to the issue of service of, or otherwise against, Mr Thibodeaux.

# Legal principles - Service

1. These proceedings are brought by Mr Saffari within the appellate jurisdiction of the Court under s 24(1)(c) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**). The Court’s jurisdiction to hear appeals from the Circuit Court extends to interlocutory judgments, including for summary dismissal, if leave is given under s 24(1A): FCA Act, s 24(1D)(ca).
2. In exercising its appellate jurisdiction, the Court can make such order as, in all the circumstances, it thinks fit: s 28(1)(b) of the FCA Act. In exercising its original and appellate jurisdiction the Court may make any procedural orders it considers appropriate in the interests of Justice: r 1.32 of the Rules.
3. Rules 35.12 and 35.15, which apply by virtue of r 35.11(a), provide that a party seeking leave to appeal must, within two days of filing the application, serve on each person who was a party to the proceedings in the court appealed from, the application and prescribed accompanying documents, which includes a copy of the judgment or order in respect of which leave to appeal is sought.

## Mode of Service

1. Rule 35.16 then provides as to the mode of service:

An application under rule 35.12 or 35.14 and the accompanying documents must be served in one of the following ways:

(a) by serving a signed and sealed copy of the application and documents personallyon the party;

(b) by delivering a signed and sealed copy of the application and documents to the party's address for service in the proceedings in the court sought to be appealed from.

1. No provision is made in Part 35 of the Rules (Leave to appeal) for deemed or substituted service or for service outside Australia. Each of those topics are addressed in Part 10 of the Rules (Service). The amended application for leave to appeal is an originating application under the Rules: Dictionary, Schedule 1, “originating application” (cf. a Notice of Appeal).

## Deemed Service

1. Rule 10.23 of the Rules provides in respect of deemed service:

A party may apply to the Court, without notice, for an order that a document is taken to have been served on a person on a date mentioned in the order if:

(a) it is not practicable to serve a document on the person in a way required by these Rules; and

(b) the party provides evidence that the document has been brought to the attention of the person to be served.

1. The requirements in r 10.23(a) and (b) are cumulative. The applicant must satisfy the Court that it is not practicable to serve in a way required by the Rules and that the document has been brought to the attention of the person to be served.

## Substituted Service

1. In respect of substituted service, r 10.24 provides:

If it is not practicable to serve a document on a person in a way required by these Rules, a party may apply to the Court without notice for an order:

(a) substituting another method of service; or

(b) specifying that, instead of being served, certain steps be taken to bring the document to the attention of the person; or

(c) specifying that the document is taken to have been served:

(i) on the happening of a specified event; or

(ii) at the end of a specified time.

1. Before an order for substituted service can be made, the applicant must satisfy the Court that it is not practicable to serve the document on the person in a way required by the Rules.

## Service out

1. In respect of an application for leave to serve an originating application outside Australia, r 10.42, which is subject to r 10.43, sets out when an originating application may be served outside Australia.
2. Rule 10.43 provides:

(1) Service of an originating application on a person in a foreign country is effective for the purpose of a proceeding only if:

(a) the Court has given leave under subrule (2) before the application is served; or

(b) the Court confirms the service under subrule (6); or

(c) the person served waives any objection to the service by filing a notice of address for service without also making an application under rule 13.01.

(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.

(5) A party may apply to the Court for leave to give notice, in a foreign country, of a proceeding in the Court, if giving the notice takes the place of serving the originating application.

(6) If an originating application was served on a person in a foreign country without the leave of the Court, a party may apply to the Court for an order confirming the service.

(7) For subrule (6), the party must satisfy the Court that:

(a) paragraphs (4)(a) to (c) apply to the proceeding; and

(b) the service was 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; and

(c) there is a sufficient explanation for the failure to apply for leave.

1. Rule 10.48 makes provision for deemed service in the context of service outside of Australia. It is the corollary of r 10.23 (extracted at [29] above) which provides for deemed service within Australia. In respect of service outside Australia, r 10.48 provides:

A party may apply to the Court without notice for an order that a document is taken to have been served on a person on a date mentioned in the order if:

(a) it is not practicable to serve a document on the person in a foreign country in accordance with a convention, the Hague Convention or the law of a foreign country; and

(b) the party provides evidence that the document has been brought to the attention of the person to be served.

1. Rule 10.49 provides for substituted service in the context of service outside Australia. It is the corollary to r 10.24 of the Rules (extracted at [31] above). Rule 10.49 provides:

If service was not successful on a person in a foreign country, in accordance with a convention, the Hague Convention or the law of a foreign country, a party may apply to the Court without notice for an order:

(a) substituting another method of service; or

(b) specifying that, instead of being served, certain steps be taken to bring the document to the attention of the person; or

(c) specifying that the document is taken to have been served:

(i) on the happening of a specified event; or

(ii) at the end of a specified time.

1. Where a person to be served is in a foreign country, it is not appropriate for the Court to consider an order for substituted service unless an order has first been obtained granting leave to serve outside Australia in accordance with r 10.43 of the Rules: *Federal Commissioner of Taxation v* ***Zeitouni*** [2013] FCA 1011; 306 ALR 603 at [26] (Katzmann J) and the cases cited therein.
2. The condition that "service is [or was] not practicable" in the way otherwise required by the Rules appears in rr 10.23, 10.24 and 10.48 of the Rules. The phrase "not practicable" is given the same meaning for the purposes of each of those rules (***Sanum*** *Investments Limited v ST Group Co Ltd (No 2)* [2019] FCA 1047 at [45] (Foster J)), and is to be understood to contemplate a "state of affairs which is practically impossible to navigate without substantial difficulty": *Sanum* at [151]. Evidence of attempts to serve, attempts to contact the intended recipient and knowledge (or lack of knowledge) of the whereabouts of the intended recipient are relevant to the question of practicability: see, e.g., *Ross v Cotter* [2015] FCA 310 at [2] (Reeves J); and *Kosmos Capital Pty Ltd v Turiya Ventures LLC* [2019] FCA 528 at [50] (Jackson J).
3. For substituted service, it is also necessary for an applicant to demonstrate that the method of service proposed is one which, in all reasonable probability, if not certainty, will be effective to bring knowledge of the process to the intended recipient: *Pollis v Zombor* [2019] FCA 856 at [13] (O’Bryan J).

## Service on companies under the Corporations Act

1. Section 109X of the Corporations Actpermits service of documents, including legal process, on companies by post to the registered offices of the company, and also by personal service on one director of the company. Section 109X applies in respect of service “on a company”. Company is relevantly defined as a company registered under the Corporations Act: s 9 “company”. The section is facilitative – it does not prevent service by any other mode of service: s 109X(6).

# Mr Saffari’s Submissions

1. Mr Saffari’s affidavit includes material that is essentially by way of submission. I have read his material of that nature as a submission and treated it as supplementing his written submissions.
2. Mr Saffari’s submissions are directed in part to voicing his opposition to Mr Braeuniger’s representatives being heard on this application and being permitted to file evidence. Mr Braeuniger sought to be heard on the present application. The principal argument on which his representatives relied was that their participation was desirable for the purpose of assisting the Court. Without any criticism of Mr Saffari, counsel for Mr Braeuniger submitted that it would be of assistance to the Court in the circumstances of this application because Mr Saffari is self-represented, the service issues are technical, the evidentiary materials were at risk of being incomplete in material respects unless supplemented (particularly in respect of corporate searches for relevant entities in Australia and overseas) and further that Mr Braeuniger should be afforded an opportunity to respond to Mr Saffari’s allegations in respect of the role of his legal representatives. Mr Braeuniger’s representatives further pointed to the overlap between the grounds of appeal in the draft notice of appeal directed to Mr Braeuniger and those directed to the remaining parties to demonstrate that they had an interest in being heard on the application.
3. Over Mr Saffari’s objection, I granted leave for Mr Braeuniger’s representatives to file and serve evidence (including corporate searches in respect of the various entities referred to by Mr Saffari) and written submissions for the assistance of the Court. I concluded that to do so would facilitate the overarching purpose in s 37M of the FCA Act in respect of the interlocutory application. To the extent that the submissions filed by Mr Braeuniger traverse beyond the matters which arise in the interlocutory application (which is directed to obtaining relief against Amazon and Mr Bezos) I have disregarded them.
4. Mr Saffari makes the following submissions in relation to the corporate relationships between Amazon and ACS (and their officers and representatives):
5. ACS, as a wholly-owned subsidiary, is an extension of its parent company, that is Amazon, and accordingly is not treated as an individual company;
6. Amazon is a shadow director of ACS and controls and dictates the policies of ACS;
7. Amazon is at law a director relying on ss 9 (definition “director”), 46 and 187 of the Corporations Act and s 4A of the *Competition and Consumer Act 2010* (Cth) and *Standard Chartered Bank of Australia Ltd v Antico (No 1)* (1995) 38 NSWLR 290, *Standard Chartered Bank of Australia Ltd v Antico (No 2)* (1995) 38 NSWLR 328, *Australian Securities Commission v AS Nominees Ltd* [1995] FCA 1663; 62 FCR 504 , *CSR Ltd v Wren* (1997) 44 NSWLR 463 at 485;
8. Amazon, as the parent company of its wholly-owned subsidiary, has the same obligations as the director of the subsidiary including duty of care, liabilities and damages;
9. Amazon has a centralised control over all of its subsidiaries including in Australia;
10. ACS and Amazon are economically integrated and financially interdependent;
11. ACS and Amazon are administratively interdependent with an overlapping employment structure with a “Common Group Persona”;
12. Amazon appoints managers to their storefront subsidiaries in different countries and refers to them as **Country Managers**;
13. In Australia, a Country Manager is referred to as a **Resident Director** under the Corporations Act;
14. Amazon, in its capacity as a shadow director, appointed Mr Braeuniger as a Resident Director of ACS in August 2017; and
15. Amazon then removed Mr Braeuniger from his position as a Resident Director in October 2019 and transferred him to Europe.
16. Mr Saffari relies on these contentions in relation to corporate relationships between Amazon and ACS in the submissions he advances with respect to the specific relief he seeks. For the purpose of this application there is no evidence from which I could infer that as a matter of fact, Amazon is a shadow director of ACS. Apart from bare corporate searches, there is no evidence before me as to the management or operational arrangements between Amazon and any of the other companies to whom Mr Saffari refers. In respect of ACS, the only evidence derives from the ASIC search which lists Amazon as the ultimate holding company of ACS.

## Deemed Service

1. Mr Saffari submits that pursuant to r 10.48(b) of the Rules, the Court should make an order that deems Amazon and Mr Bezos to have been be served with the leave documents. Mr Saffari’s submissions as to deemed service are framed in three ways. First, that service of the leave documents on ACS, is effectively service on Amazon as, in Mr Saffari’s submission, Amazon and ACS are one corporate entity. Second, that by serving Mr Braeuniger at the offices of his legal representative, Dentons, he has effected service on Amazon as Mr Braeuniger is, Mr Saffari submits, a Resident Director of ACS within the meaning of the Corporations Act and Amazon and ACS are one corporate entity under the Corporations Act. Third, that in any event, Amazon and Mr Bezos are aware of the proceedings based on the response to the OAIC complaint.
2. Mr Saffari submits that the rules governing service and service on corporations are a means to an end directed to ensuring that parties have been provided with relevant Court documents so that they are aware of the case against them and to ensure that a party is not held to account without knowing of the case against them. He contends, that “the rules governing service are not sacred rituals that must be performed even if it means repeating a process that has already been performed successfully”.

## Default judgment

1. Mr Saffari seeks an order that the Court enter default judgment against Amazon and Mr Bezos in respect of the relief sought in the statement of claim filed in the proceedings below.
2. As noted above, Mr Saffari seeks to rely on evidence in respect of the OAIC investigation for the purpose of this interlocutory application to establish that Amazon and Mr Bezos have been aware of these proceedings and have chosen not to participate in these proceedings. I have admitted the evidence in relation to the OAIC investigation for the purpose of this interlocutory application.
3. Mr Saffari contends that Amazon and Mr Bezos are in possession of the relevant Court documents because of the Morneau Letter and therefore have knowledge of the proceedings. Further that it should be inferred that they intend to be in default either “because the matter is trivial to them” or because they wish “to end the matter without appearance to limit any damage to Amazon’s reputation”.
4. Mr Saffari argues that Dentons is “taking instructions” from Amazon and Mr Bezos’ legal teams in Seattle. In support of this contention, Mr Saffari relies upon Dentons’ involvement in the investigation conducted by the OAIC regarding the privacy complaint made by Mr Saffari. Mr Dalzell, a partner of Dentons, has provided an affidavit which addresses Dentons’ role in the OAIC investigation. The respondent in the OAIC investigation is Amazon Australia Services Inc., a foreign company based in Wilmington, Delaware, USA (**AAS**). Dentons are the legal representatives of AAS in relation to the OAIC investigation. AAS is not a party to these proceedings. Dentons’ Privacy Team is instructed by Jeff Morneau, Associate General Counsel, Books, on behalf of AAS in relation to the OAIC investigation. Mr Morneau is located in Seattle. Mr Dalzell, who is acting in these proceedings for Mr Braeuniger wrote the initial letter from Dentons to the OAIC on 21 June 2021 confirming that Dentons had been retained by AAS and seeking an extension of time for AAS to reply to a notice issued by the OAIC. Since that initial letter, the OAIC investigation has been handled on behalf of AAS by Ben Allen, a partner in Dentons’ Privacy Team.

## Service out pursuant to Hague Convention or by substituted service

1. In the event that Mr Saffari does not obtain orders in respect of deemed service, he applies in the alternative for orders that Amazon and Mr Bezos “be served again as per Rule 10.42” by one of three nominated “methods of service” or that the “method of service be in the form of the [Hague Convention] as per Division 10.4 of the [Rules]”.
2. Mr Saffari’s submissions do not address this relief. Nor has he led evidence to demonstrate that it is, or would not be, practicable to serve Amazon and Mr Bezos in the manner provided for by the Rules. Mr Saffari has not addressed in his evidence or his submissions why it is that he has not sought leave to serve out of Australia in accordance with the Rules. Based on the whole of his evidence and submissions, it appears that Mr Saffari has not sought leave to serve or attempted to serve Amazon or Mr Bezos outside Australia because he maintains that the steps he has already taken in Australia are sufficient in that regard.

# Consideration

1. There are three preliminary issues which I will address before turning to the substance of the interlocutory application.
2. First, while Mr Saffari has filed evidence and made submissions in support of his application, he has not had the benefit of legal representation. I am mindful of the difficulties faced by self‑represented litigants and have taken this into account in considering Mr Saffari’s submissions and in determining the present application. I am particularly mindful that the rules in relation to service give rise to technical issues which can be difficult. That said, I have sought to respect Mr Saffari’s decision not to seek leave to serve out of jurisdiction, accepting that this is a matter to which he has turned his mind and decided not to pursue.
3. Second, and regrettably, as noted above, Mr Saffari’s submissions included allegations of misconduct against counsel appearing for Mr Braeuniger. Those allegations were not supported by evidence. I feel compelled to add that, to date, during the case management of the leave proceedings, counsel for Mr Braeuniger has repeatedly offered assistance to Mr Saffari and to the Court in accordance with his duty to the Court and in observation of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) consistently with the objective of facilitating a fair hearing and with due regard to his duty to his client.
4. Third, as I have indicated above, in so far as Mr Saffari seeks leave to rely for the purpose of this interlocutory application on the materials in respect of the OAIC investigation, I have admitted them as evidence on this application.

## Deemed Service

1. Mr Saffari seeks the following relief in relation to deemed service (as written):

1. That service of the Application for Leave to Appeal on the First and Second Respondents be accepted as already served pursuant to Rule 10.02 of the *Federal Court Rules 2011 (Cth),* citing Section 109X(1)(a)(b) of the *Corporations Act 2001 (Cth).*

2. That the Fourth Respondent’s Counsel accepted service on behalf of the Corporation (Amazon.com Inc) including the First and the Second Respondents as per Rule 10.11 and 10.22 of the *Federal Court rules 2011 (Cth).*

3. That on the grounds set out in the accompanying Affidavit affirmed by Shahriar Saffari on 11 August 2021, the First and the Second Respondents have been properly served.

4. That on the grounds set out in the accompanying Affidavit, it is proven that the First and the Second Respondents are in possession of sealed Application for Leave to Appeal and Amended Application for Leave to Appeal filed by the Appellant.

5. That evidence obtained from the Office of the Australian Information Commissioner (OAIC) attached to the accompanying Affidavit be allowed:

(a) The documents are further evidence that the First and the Second Respondents have been aware of these proceedings as per Rule 10.48 (b) of the *Federal Court Rules 2011 (Cth)* and have chosen not to participate in these proceedings.

6. That the First and the Second Respondents have had knowledge of facts of these proceedings against them as per Rule 10.23 (b) and 10.24 (c)(i)(ii) of the *Federal Court Rules 2011 (Cth)* and have chosen not to participate in these proceedings.

7. That as per Rule 10.48 (b) of the *Federal Court Rules 2011 (Cth)* the Court exercise its discretion and find that the First and the Second Respondents be Deemed to have been Served.

1. For the reasons which follow, I am satisfied that it is not appropriate to make an order under r 10.48(b) of the Rules that Amazon and Mr Bezos are taken to have been served with the leave documents. I set out my reasons by reference to each of the prayers for relief.
2. Before turning to the particular provisions on which Mr Saffari relies, I again note that at no stage has Mr Saffari sought or obtained leave to serve Amazon and Mr Bezos out of Australia under r 10.43(2) of the Rules. As I follow Mr Saffari’s submissions, particularly his submissions in reply, Mr Saffari maintains that such leave is not necessary. That is despite r 10.43(1)(a) which provides that service of an originating application on a person in a foreign country is effective for the purpose of a proceeding only if:
   1. the Court has given leave under subrule (2) before the application is served; or
   2. the Court confirms the service under subrule (6); or
   3. the person served waives any objection to the service by filing a notice of address for service without also making an application under rule 13.01.

Had Mr Saffari sought leave to serve out of Australia it would be relevant for the Court to have regard to the matters in r 10.43(4) including to consider whether Mr Saffari has demonstrated a prima facie case for all or any of the relief claimed in the proceedings. He has not attempted to do so.

1. Mr Saffari’s contention that he does not require leave to serve out appears to be predicated on the declaratory relief he seeks under prayers 1 to 7.
2. By prayer 1, Mr Saffari seeks, in effect, a declaration that service has been effected on Amazon and Mr Bezos pursuant to r 10.02 of the Rules and s 109X of the Corporations Act.
3. Mr Bezos is an individual and not a company. The service mechanisms provided under r 10.02 of the Rules and s 109X of the Corporations Act do not apply in relation to individuals.
4. Section 109X relevantly applies to companies that are registered under the Corporations Act. The evidence on this application establishes that Amazon is a company incorporated outside Australia. Further, that it is the ultimate holding company of ACS. There is no evidence as to whether it is registered under the Corporations Act or that it is relevantly carrying on business in Australia such that it is required to be so registered. Further there is no evidence that Mr Saffari has served Amazon at its registered office in Seattle, Washington USA. Mr Saffari would require leave to serve outside Australia or to confirm service outside Australia. He has not applied for leave. The service mechanisms provided for in r 10.02 of the Rules and s 109X of the Corporations Act do not assist Mr Saffari in establishing that the act of delivering the leave documents to the registered office of ACS was effective in serving Amazon.
5. By prayer 2, Mr Saffari contends that Mr Braeuniger’s “Counsel” accepted service on behalf of Amazon and Mr Bezos in accordance with rr 10.11 and 10.22 of the Rules. I understand Mr Saffari’s reference to Mr Braeuniger’s “Counsel” to be a reference to the law firm Dentons.
6. Rule 10.11 provides:

Unless an application has been made under rule 13.01, if a respondent files a notice of address for service, defence or affidavit, or appears before the Court in response to an originating application, the originating application is taken to have been served personally on the respondent:

(a) on the date on which the first of those events occurred; or

(b) if personal service on the respondent is proved on an earlier date — on the earlier date.

1. Rule 10.22 provides:

(1) A lawyer may accept service of an originating application for a respondent if:

(a) the lawyer has authority to accept service of an originating application for the respondent; and

(b) the lawyer endorses a note on a copy of the document that the lawyer accepts service of the document for the respondent.

(2) A document that is endorsed by a lawyer under paragraph (1)(b) is taken to have been served personally:

(a) on the date that the endorsement is made; or

(b) if personal service on the respondent is proved on an earlier date — on the earlier date.

1. Dentons acts for Mr Braeuniger in the leave proceedings and has entered an address for service on his behalf. Dentons similarly acted in the Circuit Court proceedings for Mr Braeuniger. Mr Dalzell, a partner of Dentons, has deposed to the fact that Dentons does not act, and has never acted, for any other respondent in these proceedings. Mr Dalzell also deposes to the fact that Dentons does not have, and has never had, instructions to accept service on behalf of Amazon and Mr Bezos. There is no basis upon which to conclude that in filing an address for service Dentons was acting on behalf of anyone other than Mr Braeuniger – the notice is express in that regard. Similarly, there is no basis for Mr Saffari’s contention that Dentons had authority to accept service on behalf of Amazon or Mr Bezos. Mr Dalzell’s evidence on the issue is that Dentons did not. In so far as Mr Saffari relies on the OAIC investigation material I address that specifically below. For present purposes, I note that the OAIC materials do not establish that Dentons was relevantly authorised by Amazon or Mr Bezos to accept service in respect of the leave proceedings.
2. It is convenient to consider prayers 3 and 4 together. Prayer 3 is curiously expressed but it is tolerably clear that it is intended to engage the arguments that Mr Saffari advances with respect to the corporate relationships between the various companies to establish that service on ACS is effective as service on Amazon and Mr Bezos. Prayer 4 relies on prayer 3 being determined in Mr Saffari’s favour. The matters relied on by Mr Saffari in relation to service on ACS are set out at [19] – [23] and are not repeated here. Mr Saffari’s contentions as to the corporate relationships are summarised at [44] above. In essence Mr Saffari contends that Amazon is a shadow director of ACS or alternatively that because ACS is a wholly owned subsidiary of Amazon it is to be treated as if it was not a separate legal entity and that it is one and the same as Amazon. Mr Saffari contends that ACS is part of the singular entity that is its ultimate holding company.
3. Mr Saffari’s submissions in respect of the corporate relationships must be rejected. He has not established any recognised basis upon which the Court would not give effect to the distinct legal personalities of Amazon and ACS as separate corporate entities. There is no evidence to establish that Amazon is a shadow director of ACS. Mr Saffari’s contention that ACS and Amazon are one and the same cannot be maintained. The submissions made by Mr Saffari do not rise above mere assertion and are fundamentally flawed as a matter of legal principle. The law recognises that a subsidiary company is a separate legal entity, independent of a parent company and possessing its own assets, creditors and conducting its own business: Besanko J citing *Walker v Wimborne* (1976) 137 CLR 1 at 6–7 per Mason J; *Industrial Equity Ltd v Blackburn* (1997) 137 CLR 567 at 577 at [345] per Mason J in *Australian Competition and Consumer Commission v Yazaki Corporation (No 2)* [2015] FCA 1304;332 ALR 396 (a passage which was unchallenged on appeal: see *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; 262 FCR 243 at [40] (Allsop CJ, Middleton and Robertson JJ)). Further, a parent company will not be imputed with the knowledge of a subsidiary by reason only of the corporate relationship: *Dometic Australia Pty Ltd v Houghton Leisure Products* [2018] FCA 1573; 135 IPR 403 at [253] (White J) and the cases cited therein.
4. By prayer 5, 6 and 7, Mr Saffari seeks an order that the evidence obtained by him in relation to the OAIC investigation be allowed as “further evidence that [Amazon] and [Mr Bezos] have been aware of these proceedings”. Prayers 5, 6 and 7 seek to engage rr 10.23, 10.24 and 10.48 of the Rules, each of which impose cumulative requirements. The first requirement is that the applicant must establish that it is not practicable to serve the relevant documents in the manner required (whether under the Rules, a convention, the Hague Convention or the law of a foreign country). The second requirement is that the applicant must establish by evidence that the relevant documents have been brought to the attention of the person to be served. Mr Saffari’s application relies entirely on establishing “awareness” and does not attempt to establish that it is not practicable to serve in the way required.
5. In so far as Mr Saffari seeks to rely on the OAIC material for the purpose of this application he may do so, however, I am not satisfied that there is any utility in making declarations to the effect sought in prayers 5, 6 and 7 where Mr Saffari has not established that it is not practicable to serve Amazon and Mr Bezos in the manner required. In addition, I am not satisfied that the evidence on which Mr Saffari relies is such that I should infer that Amazon and Mr Bezos are aware of the proceedings. Mr Dalzell deposes that the only respondent to the OAIC investigation is AAS, a company incorporated in the United States that is *not* a party to this proceeding. Mr Dalzell also deposes that Dentons’ Privacy team is receiving instructions in respect of the OAIC investigation from Mr Morneau, whose title is ‘Associate General Counsel, Books’. I am not prepared to infer from the fact of Dentons’ involvement in the OAIC investigation as legal representatives of a corporate entity that is not a party to this proceeding that Amazon and Mr Bezos are both aware of, and have decided not to, participate in the proceedings. In any event, even if the OAIC documents by which Mr Saffari seeks to demonstrate relevant awareness of the leave proceedings by Amazon and more remotely, Mr Bezos, did establish a basis to infer such awareness, Mr Saffari has not demonstrated that it is not practicable to serve Amazon and Mr Bezos in a way required by the Rules. That he must do if he wishes to obtain relief under rr 10.23, 10.24 and 10.48 of the Rules.
6. By prayer 7, Mr Saffari seeks an order for deemed service predicated on success in obtaining the declaratory relief in prayers 1 to 6. As such, prayer 7 falls with prayers 1 to 6.

## Default judgment

1. Mr Saffari seeks the following relief (as written):

8. That as per Rule 5.22 of the *Federal Court Rules 2011 (Cth)* the First and the Second Respondents are in default.

9. An Order that as per Rule 5.23 (2)(c)(d) of the *Federal Court Rules 2011 (Cth)* the First and the Second Respondents are in Default.

10. An Order giving judgement against the First and the Second Respondents for relief claimed in the Statement of Claim.

1. This aspect of Mr Saffari’s application is misconceived.
2. Mr Saffari’s contention in *the leave proceedings* that he has, first, effected or should be deemed to have effected service on Amazon and Mr Bezos and second that they are therefore respectively in default of doing an act required under the rules or of defending *the leave proceeding* with due diligence would not, even if established, give rise to judgment against them for the relief claimed in *the Circuit Court proceedings*. As it is, Mr Saffari has not established that he has effected service, or should be deemed to have effected service, on Amazon and Mr Bezos and accordingly has not established that either Amazon or Mr Bezos is in default in the leave proceedings. More fundamentally, there has been no substantive hearing on the claims which Mr Saffari sought to pursue against Amazon and Mr Bezos in the Circuit Court proceedings because he was found not to have effected service for the purpose of those proceedings within the time required under the Circuit Court Rules.
3. I address the issue of the practicability of service at [83] in the context of the relief sought in relation to substituted service.
4. For completeness, I note that Mr Saffari contends that I should infer that Amazon and Mr Bezos have elected not to participate in the proceedings. Mr Saffari proffers two reasons why Amazon and Mr Bezos may have made such an election, either “because the matter is trivial to them” or because they wish “to end the matter without appearance to limit any damage to Amazon’s reputation”. In circumstances where the evidence does not establish that Amazon or Mr Bezos are aware of the leave proceedings, there is no basis upon which to infer that they have elected not to participate in the proceedings, let alone what their respective motivations may be for doing so if they have in fact so elected.

## Substituted service or service under the Hague convention

1. In the alternative to prayers 1 to 10, Mr Saffari seeks the following relief in relation to substituted service (as written):

11. That in the alternative, if the Court finds that service has not been effected on the First and the Second Respondents, the Court orders that the First and the Second Respondents be served again as per Rule 10.42 of the *Federal Court Rules 2011 (Cth)*:

a) That the alternative method of service be in the form of emailing the relevant Court documents to Jeff Morneau the Associate General Legal Counsel at Amazon.com Inc in Seattle Washington to (jmorneau@amazon.com ); and/or

b) that the relevant documents be sent via registered post to the known address of Amazon legal office at Amazon.com Inc headquarters in Seattle Washington at 2021 7th avenue Seattle Washington USA 98121; and/or c) that the relevant documents be hand delivered by a licensed process server to Amazon’s Registered Agent, c/o Corporation Service Company, 300 Deschutes Parkway South West, Tumwater Washington USA 98501.

12. That in the alternative, if the Court thinks fit, method of service be in the form of the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965* (**Hague Service Convention**) as per Division 10.4 of the *Federal Court Rules 2011*.

1. Again, the difficulty for Mr Saffari is that he has not sought leave to serve out of jurisdiction.
2. The orders Mr Saffari seeks in prayers 11 and 12 are directed to “methods” of service, not to leave to serve outside the jurisdiction. As noted above, Mr Saffari maintains that in the whole of the circumstances he does not need leave to serve out of the jurisdiction. In doing so he relies on the same matters that inform his claims for relief in prayers 1 to 7. For the reasons given above, I am not satisfied that Mr Saffari has served Amazon and Mr Bezos. Nor am I satisfied that he should be deemed to have done so. In the circumstances, Mr Saffari must first obtain leave under r 10.43(2) of the Rules to serve outside of Australia. In order to obtain leave to serve outside Australia, Mr Saffari must satisfy the Court in respect of the matters listed in r 10.43(4)(a)-(c) of the Rules, noting that subparagraph (c) requires Mr Saffari to establish a prima facie case for all or any of the relief claimed in the leave proceeding. Mr Saffari has not sought leave to serve outside Australia. As I understand his position, he declines to seek leave, because he contends that in both the leave proceedings and the Circuit Court proceedings that Amazon and Mr Bezos have been served by the acts he has taken in relation to Mr Braeuniger and ACS or are otherwise aware of the proceedings and that awareness is enough without establishing that service as contemplated by the Rules would not be practicable.
3. In the present circumstances where the substituted service orders are directed to service outside Australia, it would be inappropriate for the Court to consider an order for substituted service unless an order has first been obtained granting leave to serve outside Australia. That is consistent with the requirements set out in r 10.43 of the Rules: *Zeitouni* at [26] (Katzmann J) and the authorities cited therein. In the circumstances of the present application it would not be consistent with the overarching purpose to order substituted service on parties outside Australia when the conditions in r 10.43(4)(a)-(c) on the grant of leave to serve out have not been addressed.
4. Further, having regard to the principles set out at [38] above, Mr Saffari has not adduced evidence from which it could be inferred that service is not practicable in one of the ways otherwise required: see rr 10.23, 10.24 and 10.48 of the Rules. He has not led evidence of attempts to serve or contact Amazon or Mr Bezos or what the state of his knowledge (or lack of knowledge) is in respect of their whereabouts: see authorities cited at [38] above.
5. For the foregoing reasons, I am not satisfied that the orders for substituted service and/or for service under the Hague Convention which Mr Saffari seeks should be made.

# Conclusion

1. For these reasons, the interlocutory application is dismissed with costs.

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| I certify that the preceding eighty-five (85) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Cheeseman. |

Associate:

Dated: 12 May 2022

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  |  |
| Respondents |  |
| Fourth Respondent: | ROCCO BRAEUNIGER |