FEDERAL COURT OF AUSTRALIA

Kabbabe v Google LLC [2020] FCA 126

File number:	VID 1331 of 2019
Judge:	**MURPHY J**
Date of judgment:	12 February 2020
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 10.43 – 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 – service in accordance with the Hague Service Convention – whether service by post is permissible – leave granted to serve originating application outside Australia
Legislation:	*Federal Court Rules 2011* (Cth) rr 7.22, 10.41, 10.42, 10.43
Cases cited:	*Ahmed v Al-Hussain Pty Ltd t/as The Cheesecake Shop* [2018] FCA 1741 *AIA Australia Ltd v Richards* [2017] FCA 84 *Allphones Retail Pty Ltd v Australian Competition and Consumer Commission* [2009] FCA 980; (2009) 259 ALR 354 *Australian Broadcasting Corporation v Seven Network Ltd* [2005] FCA 1851 *Bell v Steele* [2011] FCA 1390; (2011) 198 FCR 291 *Deputy Commissioner of Taxation v Cheung Kong Infrastructure Holdings Ltd* [2013] FCA 707; (2013) 96 ATR 44 *Deputy Commissioner of Taxation v Power Assets Holdings Ltd (previously known as Hongkong Electric Holdings Ltd)* [2013] FCA 708; (2013) 96 ATR 51 *Dow Jones & Co v Gutnick* [2002] HCA 56; (2002) 210 CLR 575 *Hooper v Kirella Pty Ltd* [1999] FCA 1584; (1999) 96 FCR 1 *Water Splash Inc v Menon* 581 U.S.___(2017) *Practical Handbook on the Operation of the Hague Service Convention* (Permanent Bureau of the Hague Conference on Private International Law, 2006))

Date of hearing:	27 March 2020
Registry:	Victoria
Division:	General Division
National Practice Area:	Other Federal Jurisdiction
Category:	Catchwords
Number of paragraphs:	19
Solicitor for the Prospective Applicant:	Mr M Stanarevic of Matrix Legal

ORDERS

VID 1331 of 2019

BETWEEN:	**MATTHEW ROY KABBABE** Prospective Applicant
AND:	**GOOGLE LLC** Respondent

JUDGE:	**MURPHY J**
DATE OF ORDER:	**12 FEBRUARY 2020**

THE COURT ORDERS THAT:

1. Pursuant to rr 10.42 and 10.43 of the *Federal Court Rules 2011* (Cth) the Prospective Applicant has leave to serve:

   (a) the originating application filed 6 December 2019;

   (b) the affidavit of Mark Stanarevic affirmed 6 December 2019;

   (c) the affidavit of Dr Matthew Kabbabe affirmed 10 February 2020; and

   (d) a copy of this order;

   upon the Respondent in the United States of America, in accordance with Article 10(a) of the "Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters" done at The Hague on 15 November 1965, by sending it by international registered post, with an acknowledgement of receipt to be provided to the Prospective Applicant, to the Respondent's address at:

   Google LLC

   C/O Custodian of Records

   1600 Amphitheatre Parkway

   Mountain View, California 94043

   United States of America

2. The matter be listed for a case management hearing on 25 March 2020 at 9.30 am.

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

REASONS FOR JUDGMENT

MURPHY J:

1 The prospective applicant, Dr Matthew Kabbabe, is a dental surgeon based in Victoria who relies on the internet to attract customers across Australia. He seeks leave to serve an originating application upon the respondent Google LLC (**Google**), which is based in the United States of America, pursuant to Part 10 of the *Federal Court Rules 2011* (Cth) (the **Rules**). The originating application is brought under r 7.22 of the Rules and seeks orders to require Google to provide preliminary discovery of all documents or things in its possession or control relating to the description of an unknown person who posted an allegedly defamatory review in relation to Dr Kabbabe's dental practice on Google, using a pseudonym. Dr Kabbabe seeks preliminary discovery to identify the unknown prospective respondent so that he may bring a defamation proceeding against him or her.

2 For the reasons I explain, I consider it appropriate to accede to the application and to grant leave to Dr Kabbabe to serve the proceeding on Google in the USA in accordance with Article 10(a) of the "Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters" done at The Hague on 15 November 1965 (the **Hague Service Convention**) by sending it by international registered post, with an acknowledgement of receipt to be provided to Dr Kabbabe's solicitor.

CONSIDERATION

3 Rule 10.43(2) provides that a party may apply to the Court for leave to serve an originating application on a person in a foreign country in accordance with the Hague Service Convention. Before leave may be granted to serve an originating application on a respondent outside Australia the Court must be satisfied of four matters set out in r 10.43(3) and (4) of the Rules;

(a) the application must be accompanied by an affidavit which states the name of 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));

(b) the Court has jurisdiction in the proceeding (r 10.43(4)(a));

(c) the proceeding is of a kind mentioned in r 10.42 (r 10.43(4)(b)); and

(d) the applicant has a prima facie case for all or any of the relief claimed in the proceeding (r 10.43(4)(c)).

4 I am satisfied of each of those matters.

5 *First*, the prospective applicant relies on the affidavit of his solicitor, Mr Mark Stanarevic of Matrix Legal, affirmed 6 December 2019, which establishes that the USA is a contracting party to the Hague Service Convention.

6 As Allsop J (as his Honour then was) noted in *AIA Australia Ltd v Richards* [2017] FCA 84 (***AIA Australia***) at [7] the Hague Service Convention contemplates several mechanisms (or "channels" as they are described in the *Practical Handbook on the Operation of the Hague Service Convention* (Permanent Bureau of the Hague Conference on Private International Law, 2006)) (***Practical Handbook***) for service. His Honour said:

> The "main channel of transmission" is service under Article 5 of the Hague Service Convention through the "Central Authority" of the receiving State. The Convention also permits service through several "alternative channels": *Practical Handbook* at [183].

7 The prospective applicant proposes service by one of the alternative channels, namely service by post pursuant to Art. 10(a). That article relevantly provides:

> Provided the State of destination does not object, the present Convention shall not interfere with –
>
> a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> …

8 As Allsop J also noted in *AIA Australia* at [13], the *Practical Handbook* states at [196] that "transmission … through postal channels includes service of process upon the addressee". This Court has granted leave to serve documents by international registered post on a number of previous occasions and considered this to be compliant with Art. 10(a): see *Deputy Commissioner of Taxation v Power Assets Holdings Ltd (previously known as Hongkong Electric Holdings Ltd)* [2013] FCA 708; (2013) 96 ATR 51 at [15]-[22] (Gordon J); *Deputy Commissioner of Taxation v Cheung Kong Infrastructure Holdings Ltd* [2013] FCA 707; (2013) 96 ATR 44 at [15]-[22] (Gordon J); *Bell v Steele* [2011] FCA 1390; (2011) 198 FCR 291 at [13] and [16] (Collier J); and *Ahmed v Al-Hussain Pty Ltd t/as The Cheesecake Shop* [2018] FCA 1741 at [17] (Rares J).

9 In *Water Splash Inc v Menon* 581 U.S.___(2017) at 12 the US Supreme Court held that the Hague Service Convention does not prohibit service of process in the USA by direct post to the respondent, and there is nothing in the materials before the Court to indicate that the USA objects to direct postal service of legal process under the Convention. The *Practical Handbook* states at [204] that a comprehensive list of objecting States is available on the website of the Permanent Bureau of the Hague Conference on Private International Law. Having reviewed that website, it states that the USA does not object to service under Art. 10(a). I proceed on that basis.

10 *Second*, it is plain that the Court has jurisdiction to hear an application for preliminary discovery pursuant to r 7.22.

11 *Third*, I am satisfied that the proceeding falls within one or more of the categories or descriptions set out in r 10.42, which specifically includes applications under Part 7 of the Rules. Dr Kabbabe relies on three items in the table to the rule, namely:

(a) Item 1 - Proceeding based on a cause of action arising in Australia;

(b) Item 4 - Proceeding based on a tort committed in Australia; and

(c) Item 5 - Proceeding based on, or seeking the recovery of damage suffered wholly or partly in Australia caused by a tortious act or omission (wherever occurring).

Dr Kabbabe is not however required to satisfy each of these items. It is sufficient if the proceeding falls them one or more of the categories or descriptions and in my view it does.

12 I am satisfied that the application under r 7.22 is a proceeding based on: (a) a cause of action arising in Australia; (b) a tort committed in Australia; and/or (c) the recovery of damage suffered wholly or partly in Australia caused by a tortious act or omission wherever it occurred. The cause of action for defamation arises in Australia because publication of the allegedly defamatory review is taken to have occurred where the defamatory words were heard, read or downloaded: *Dow Jones & Co v Gutnick* [2002] HCA 56; (2002) 210 CLR 575. That is so even if the review was posted on Google from a place outside Australia, which is unlikely in the present case because it was posted by a person who claimed to have been treated at the dental clinic. Further, the damages for defamation proposed to be sought in the proceeding are for loss of reputation suffered wholly or partly in Australia.

13 *Fourth*, I am satisfied from the affidavit of Mr Stanarevic that Dr Kabbabe has a prima facie case for preliminary discovery. Rule 7.22(1) provides that a prospective applicant may apply

to the Court for an order to require a person to discover to the prospective applicant any document or thing in the person's control relating to the description of the prospective respondent. The rule is intended to provide a person with a means of obtaining information as to the identity of a party against whom the person wishes to commence a proceeding, in circumstances in which the person is unable to do so because of a lack of sufficient information about that party's description to enable an originating application to be filed: *Cape Australia Holdings Pty Ltd v Iannello* [2009] FCA 709 (Siopis J) at [63]-[64].

14 Rule 7.22(1) requires that to obtain an order the prospective applicant must satisfy the Court that:

(a) there *may* be a right for the prospective applicant to obtain relief against the prospective respondent; and

(b) the prospective applicant is unable, notwithstanding having made reasonable inquiries and taken any other steps reasonably required in the circumstances, to ascertain the description of the prospective respondent; and

(c) another person, the respondent to the application for preliminary discover, knows or is likely to know that description, or has or is likely to have, or has had was likely to have had, control of a document that would help ascertain that description;

: see *Hooper v Kirella Pty Ltd* [1999] FCA 1584; (1999) 96 FCR 1 (***Hooper v Kirella***) at [31]-[34].

15 Having regard to the affidavit of Mr Stanarevic I am satisfied that the prospective applicant *may* have a right to obtain relief for defamation against the prospective respondent. He deposes that an unknown person, acting under the pseudonym CBsm 23, posted a review on Google concerning a procedure he had undergone at Dr Kabbabe's dental clinic, including that the dentist made the whole experience "extremely awkward and uncomfortable", the procedure did not work and was a "complete waste of time"; the procedure was not "done properly" and it seemed like the dentist "had never done this before", such that other patients had "been warned!" and should "STAY AWAY".

16 A prospective applicant is not required to demonstrate the existence of a prima facie case of defamation against the prospective respondent; it is enough if the prospective applicant can show that he or she *may* have a right to obtain that relief: *Hooper v Kirella* at [33]. It is unnecessary, indeed undesirable, that I say much about the prospects of the defamation action

which Dr Kabbabe proposes to bring. It suffices to note that because the review was on Google it was visible to the public in the Australian Capital Territory along with the rest of Australia, and it is likely this Court has jurisdiction. Dr Kabbabe may be able to show that publication of the review occurred in Australia as that is where it will have been viewed or downloaded by members of the public, and that it conveyed imputations which would have tended to lower his reputation as a dental surgeon in the opinion of right-thinking members of the community. The materials show a cause of action known to the law and a real prospect of the grant of some remedy: *Allphones Retail Pty Ltd v Australian Competition and Consumer Commission* [2009] FCA 980; (2009) 259 ALR 354 (Foster J) at [54].

17 Having regard to the affidavit of Dr Kabbabe I am satisfied that he has made reasonable inquiries and taken other steps reasonably required in the circumstances, but has been unable to ascertain the description of the prospective respondent. His affidavit shows that he contacted Google in November 2019 and requested that it take down the review. Google declined to do so. On 5 February 2020 Dr Kabbabe sent an email to Google seeking provision of all identifying information about user CBsm 23 for the purposes of bringing a defamation action against that user. On the same day Google responded and said that it would not remove the review and stated that "[w]e do not have any means to investigate where and when the ID was created". Dr Kabbabe is not required to make inquiries that will be fruitless and in my view he has done enough: *Australian Broadcasting Corporation v Seven Network Ltd* [2005] FCA 1851 (Stone J) at [13].

18 Having regard to the affidavits of Mr Stanarevic and Dr Kabbabe, and notwithstanding Google's response, I consider that Google is likely to have or have had control of a document or thing that would help ascertain that description of the prospective respondent CBsm 23, which may include:

(a) the subscriber information for CBsm 23's account;

(b) the name of the users of that account;

(c) the IP address or addresses and associated information relating to that account;

(d) any phone numbers associated with that account;

(e) any location metadata associated with that account; and

(f) 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 CBsm 23's account was accessed to post the offending Google review.

19 I have made orders accordingly.

I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Murphy.

Associate:

Dated: 12 February 2020