

FEDERAL COURT OF AUSTRALIA

Seven Consulting Pty Ltd v Google LLC [2021] FCA 203

File number: NSD 1078 of 2020

Judgment of: **ABRAHAM J**

Date of judgment: 11 March 2021

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 (the Rules) – whether the application meets the requirements of r 10.43 of the Rules – 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
Bell v Steele [2011] FCA 1390; (2011) 198 FCR 291
Boyd v Automattic, Inc [2019] FCA 86
Cape Australia Holdings Pty Ltd v Iannello [2009] FCA 709
Carroll & Richardson - Flagworld Pty Ltd v PayPal Australia Pty Limited [2020] FCA 371
Colagrande v Telstra Corporation Limited [2020] FCA 1595
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 & Company Inc v Gutnick [2002] HCA 56; (2002) 210 CLR 575
Hooper v Kirella Pty Ltd [1999] FCA 1584; (1999) 96 FCR 1
Kabbabe v Google LLC [2020] FCA 126
Practical Handbook on the Operation of the Hague Service Convention (Permanent Bureau of the Hague Conference on Private International Law, 2006)

Division:	General
Registry:	New South Wales
National Practice Area:	Other Federal Jurisdiction
Number of paragraphs:	24
Date of hearing:	This matter was determined on the papers
Solicitor for the Prospective Applicants:	Mr. B Goldsmith of Goldsmith Lawyers

ORDERS

NSD 1078 of 2020

BETWEEN: **SEVEN CONSULTING PTY LTD**
First Prospective Applicant

DECLAN BOYLAN
Second Prospective Applicant

AND: **GOOGLE LLC**
Prospective Respondent

ORDER MADE BY: ABRAHAM J

DATE OF ORDER: 11 MARCH 2021

THE COURT ORDERS THAT:

1. Pursuant to rr 10.42 and 10.43 of the *Federal Court Rules 2011* (Cth) the prospective applicant have leave to serve:

- (a) the amended originating application filed on 3 March 2021;
- (b) the affidavit of Declan Boylan sworn on 23 September 2020;
- (c) the affidavit of Barrie Goldsmith affirmed on 24 September 2020;
- (d) the affidavit of Ella Mackintosh affirmed on 25 February 2021;
- (e) the affidavit of Berna Akdeniz sworn on 3 March 2021;
- (f) the affidavit of Barrie Goldsmith affirmed on 3 March 2021; and
- (g) 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 them by international registered post, with an acknowledgement of receipt to be provided to the prospective applicants, 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. Costs be reserved.
3. The matter be listed for a case management hearing on 8 April 2021 at 9:30am.

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

REASONS FOR JUDGMENT

ABRAHAM J:

1 The prospective applicants, Seven Consulting Pty Ltd and Declan Boylan, by an amended originating application dated 3 March 2021 seek an order pursuant to r 7.22 of the *Federal Court Rules* 2011 (the Rules) that the prospective respondent, Google LLC (Google), give discovery of all documents that are or have been in its control relating to the description or descriptions of a person or persons responsible or believed to be responsible for authoring or posting certain reviews about them. A schedule of reviews has been provided. The first prospective applicant alleges that it has suffered loss and damage by virtue of misleading and deceptive conduct on the part of such person or persons. The second prospective applicant alleges that he has been defamed as a result of them. Preliminary discovery is sought to identify the unknown prospective respondents so that proceedings can be brought against him or her.

2 On 25 February 2021 the matter listed was listed for case management hearing. During the case management hearing the prospective applicants sought, and I granted, leave to file an amended application and supporting material. The evidence establishes that the amended application was as a result of correspondence by the prospective applicants with Google which narrowed the number of reviews to which the prospective applicants sought information.

3 The prospective applicants apply for leave, pursuant to rr 10.41 - 10.43 of the Rules, to serve an originating application outside of Australia.

4 The prospective applicants rely on the following affidavits:

- (1) the affidavit of Declan Boylan sworn on 23 September 2020;
- (2) the affidavit of Berna Akdeniz sworn 3 March 2021;
- (3) the affidavit of Ella Mackintosh affirmed on 25 February 2021; and
- (4) the affidavits of Barrie Goldsmith affirmed on 24 September 2020 and 3 March 2021.

5 For the reasons given below, it is appropriate to make the order to grant leave to the prospective applicants to serve the proceeding on Google in the United States of America (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).

Consideration

6 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):

(1) 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);

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

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

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

7 The relevant principles in a similar factual application were recently summarised by Murphy J in *Kabbabe v Google LLC* [2020] FCA 126 at [3]-[16] (*Kabbabe*).

8 I am satisfied of the four matters identified above.

First criteria

9 The prospective applicant relies on the affidavit of his solicitor, Mr Goldsmith affirmed on 25 September 2020, which establishes, inter alia, that the USA is a contracting party to the Hague Service Convention.

10 The Hague Service Convention contemplates several channels for service 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*): *AIA Australia Ltd v Richards* [2017] FCA 84 at [7] (*AIA Australia*). Allsop CJ observed:

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].

11 The prospective applicants propose to serve the documents by sending them by international registered post, which is one of the alternative channels: namely service by post pursuant to Art. 10(a). As Allsop CJ noted in *AIA Australia* at [13], the *Practical Handbook* states at [196] that “transmission ... through postal channels [referred to in Art 10(a)] includes service of process upon the addressee”.

12 It is uncontroversial that the service of documents by international registered post is compliant with Art. 10(a), this Court having granted leave on a number of previous occasions for service in that manner: see *Kabbabe* at [8], citing *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]; *Deputy Commissioner of Taxation v Cheung Kong Infrastructure Holdings Ltd* [2013] FCA 707; (2013) 96 ATR 44 at [15]-[22]; *Bell v Steele* [2011] FCA 1390; (2011) 198 FCR 291 at [13] and [16]; *Ahmed v Al-Hussain Pty Ltd t/as The Cheesecake Shop* [2018] FCA 1741 at [17].

13 In *Kabbabe* Murphy J observed at [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.

14 I also proceed on that basis.

Second criteria

15 There can be no issue that the Court has jurisdiction to hear an application for preliminary discovery pursuant to r 7.22.

Third criteria

16 The proceeding falls within one or more of the categories or descriptions set out in r 10.42, with the prospective applicants relying on proceedings based on a cause of action arising in Australia: Item 1 of the Table in r 10.42, and proceedings based on a tort committed in Australia: Item 2. I am satisfied that an application for preliminary discovery under r 7.22 is a proceeding based on a cause of action arising in Australia and proceeding s based on a tort committed in Australia.

17 I note that a defamatory statement made online is taken to be “published” for the purposes of an action in defamation when and where it is downloaded: see *Dow Jones & Company Inc v Gutnick* [2002] HCA 56; (2002) 210 CLR 575. That a review was visible to the public in the NT and ACT, along with the rest of Australia, has previously been found to be sufficient to establish that the Court is likely to have jurisdiction to hear the prospective claim: *Kabbabe* at [16]; *Colagrande v Telstra Corporation Limited* [2020] FCA 1595 at [15]; *Boyd v Automattic, Inc* [2019] FCA 86 at [47]-[49]. It follows in this matter that the Court is likely to have jurisdiction to hear the prospective claim.

Fourth criteria

18 On the evidence relied on I am satisfied that the prospective applicants have a prima facie case for preliminary discovery pursuant to r 7.22(1): r 10.43(4)(c).

19 Rule 7.22 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. It 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: *Carroll & Richardson - Flagworld Pty Ltd v PayPal Australia Pty Limited* [2020] FCA 371 at [3]; *Kabbabe* at [13], citing *Cape Australia Holdings Pty Ltd v Iannello* [2009] FCA 709 at [63]-[64] which relates to the predecessor rule.

20 Rule 7.22 requires that the prospective applicant satisfy the Court:

- (1) there *may* be a right for the prospective applicant to obtain relief against the prospective respondent; and
- (2) 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
- (3) another person, the respondent to the application for preliminary discovery, knows or is likely to know that description, or has or is likely to have, or has had or was likely to have had, control of a document that would help ascertain that description.

see *Kabbabe* at [14], citing *Hooper v Kirella Pty Ltd* [1999] FCA 1584; (1999) 96 FCR 1 at [31]-[34] (*Hooper*).

21 A prospective applicant for preliminary discovery is not required to demonstrate the existence of a prima facie case 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: *Kabbabe* at [16], citing *Hooper* at [33]. That said, as noted above, this application is for leave pursuant to r 10.41 - 10.43 of the Rules, to serve an originating application outside of Australia which requires as one of its preconditions, that the applicant has a prima facie case for all or any of the relief claimed in the proceeding: r 10.43(4)(c).

22 The first prospective applicant carries on a business as delivery professionals providing project and program management consultancy services. It also provides related services such as external program reviews or delivery capability uplift. The prospective claims relate to a number of reviews which have been identified in the affidavits referred to above at [4]. The evidence establishes that there is a prima facie case for the reviews being fake, and that arguably damage has resulted. The evidence establishes that these reviews were published on Google, and that steps were taken by the prospective applicants with Google to remove the reviews. This occurred over time, with the final review being removed on or about 17 August 2020. The prospective applicants have also communicated with Google in an attempt to ascertain the author of the reviews to enable proceedings to be commenced.

23 Having regard to the affidavits referred to above at [4], and particularly to the affidavit of Mr Boylan sworn on 23 September 2021, the affidavit of Ms Mackintosh affirmed on 25 February 2021 and the affidavits of Mr Goldsmith affirmed on 24 September 2020 and 3 March 2021, I am satisfied that the prospective applicants have made reasonable inquiries and taken other steps reasonably required in the circumstances, but have been unable to ascertain the description of the person or persons responsible or believed to be responsible for authoring or publishing the reviews. I am satisfied that the prospective respondent is in control of documents that would help ascertain the description of the person or persons responsible or believed to be responsible for authoring or publishing the reviews.

Conclusion

24 Accordingly, I make the orders sought.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Abraham.

Associate:

Dated: 11 March 2021