Australian Information Commission v Facebook Inc: Substituting the Hague Service Convention during the Pandemic?

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Recently, in *Australian Information Commission v Facebook Inc* ([2020] FCA 531), the Federal Court of Australia ('FCA') addresses substituted service and the Hague Service Convention in the contexts of the COVID-19 pandemic. This case is important on whether defendants located outside of Australia in a Hague Convention state can be served by substituted service instead of following the Convention.

1. Facts:

Facebook Inc is a US company ('Facebook US') and Facebook Ireland is incorporated in Ireland. Due to the Analytica scandal, the office of the Australian Information Commission has investigated Facebook since April 2018 and hauled Facebook into the FCA on 9 March 2020.[1] According to the Commission, Facebook Inc and Facebook Ireland breached the Privacy Act (Cth) from 12 March 2014 to 1 May 2015.

Both defendants appointed King & Wood Mallesons ('KWM') to respond to the Commission's inquiries before the FCA proceeding was initiated. However, KWM indicated that it had no instructions to accept the service of the originating process.

Consequently, the Commission sought orders under Federal Court Rules ('FCR') 2011 rr 10.42 and 10.43(2) for leave to serve Facebook US and Facebook Ireland through the central authorities according to Article 5 of the Hague Convention and by substituted service under r 10.24. The proposed substituted service was to email the judicial documents to the named persons at KWM and the Head of Data Protection and Privacy and Associate General Counsel at Facebook Ireland.

2. Ruling

On 22 April 2020, the FCA granted both leave to serve outside Australia and the order for substituted service.

Leave to serve outside Australia was granted pursuant to FCR 2011 rr 10.42, 10.43(2) and (4). This is because the court held that it had original jurisdiction in the proceeding. As the proceeding was related to the Privacy Act, it fell into the item 14 of r 10.42 for service outside Australia. Moreover, the Commission established a *prima facie* case for the reliefs claimed in the proceeding. Further, the proposed method of service via the central authorities in the US and Ireland complied with Article 5 of the Hague Convention.

Relying on FCR 2011 r 10.24, the court considered the impact of the pandemic on service of process in the US and Ireland and consequently granted the order for substituted service. On one hand, the court held that it was not presently practicable to effect service on Facebook US pursuant to Article 5 of the Hague Convention. This is because ABC Legal has 'suspended service of process nationwide' across the US according to its website. ABC Legal is the contractor for the US Department of Justice in charge of serving foreign processes on private individuals and companies in the US under the Hague Convention. On the other hand, regarding Facebook Ireland, the court acknowledged that Ireland's High Court and postal services remained operative.[2] Nevertheless, the court held that 'it is impracticable to do so in the rapidly changing and evolving environment caused by the current pandemic; the present situation may have changed by the time service in the relevant way would be sought to be effected'.[3] Paragraph 66 contains the most important legal reasoning in the judgment concerning substituted service[4]

'[t]his Court has held, in circumstances analogous to the present, that an order for substituted service may be made under either r 10.24 or r 10.49 : *Commissioner of Taxation v Zeitouni* (2013) 306 ALR 603 at [60] (Katzmann J); see also: *Australian Competition and Consumer Commission v Kokos International Pty Ltd* [2007] FCA 2035 at [18] (French J); *Commissioner of Taxation v Oswal* [2012] FCA 1507 at [32] (Gilmour J). Even if that position is incorrect, I would have ordered substituted service under r 10.49, with a dispensation from the implicit requirement to attempt service under r 1.34, for equivalent reasons to those for which I will order substituted service under r 10.24, explained next.'

3. Comments

Before discussing the court's reasoning, we need to differentiate FCR 2011 r 10.49 from r 10.24.

FCR 2011 r 10.49 requires that the attempt to serve a defendant in a Hague Convention state according to the Convention should be made before a plaintiff applies to substituted service:

'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.'

FCR 2011 r 10.24 states:

'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.'

In light of the differences between rr 10.49 and 10.24, the court's reasoning is questionable in three respects.

First, the Hague Convention is not applicable to all the three cases cited in

Paragraph 66 of the judgment. *Zeitouni*[5] and *Kokos*[6] are cases where the defendants' addresses were unknown. The *Oswal* court noted that it was unclear who might be present at the address to accept service on behalf of the defendant.[7] Article 1 of the Hague Convention explicitly indicates that these are circumstances where the Convention is not applicable.[8] In contrast, *Facebook* is subject to the Hague Convention. Notably, it is widely accepted that the Hague Convention is of the 'non-mandatory but exclusive' nature.[9] That is, service in Convention states must be conducted in a method permitted by the Convention. Therefore, in *Facebook*, the attempt requirement of r 10.49 should not be lightly dispensed with unless the rare instance under r 1.34 is satisfied.

Second, the facts of *Facebook* does not warrant the court to invoke the rare instance of r 1.34 in disregarding the usual attempt requirement contemplated in r 10.49. There is a long-standing legal doctrine holding that substituted service should not be used to extend the court's jurisdiction in the absence of any other power to do so. In *Laurie v Carroll*, the High Court of Australia held that substituted service should not be used to replace personal service if the defendant was out of the jurisdiction when a writ was issued. In *Facebook,* no real urgency for service exists. The claim is about the defendants' conduct in 2014 and 2015. There is also no evidence showing that the two defendants may liquidate their assets in Australia or that any third party should be joined swiftly. Although due to the COVID-19 pandemic, service according to the Hague Convention may cause uncertain delay of the proceeding at the FCA, this reason alone is unlikely to justify the substitution of the Hague Convention. This is because, as a Hague Convention member state, Australia is obliged to serve foreign defendants in a Convention state according to the 'non-mandatory but exclusive' nature of the Convention. Moreover, a delay of proceeding is distinct from the urgency of proceeding contemplated in r 1.34, as per *Swan Brewery Co Ltd v Atlee*. In this case, the defendant was in the Philippines, where service through diplomatic channels could take six months or considerably more. However, the court rejected the plaintiff's application for an order to serve a sequestration order by post. The court held that, while the utilisation of the diplomatic channel was impractical, it was not established on the evidence that personal service was not impractical. Similarly, in *Facebook*, although the ABC Legal Service in the US suspended its service, no evidence showed that service via the US post was impractical. The COVID-19 pandemic's effect in delaying the proceedings alone cannot justify the dispense of the attempt requirement in r 10.49.

Third, more evidence should be required to prove that rr 10.24 and 10.45 are satisfied in *Facebook*. Because Ireland's High Court and postal services are operative amid the COVID-19 pandemic, serving Facebook Ireland in accordance with Hague Convention is possible. The court described how the environment is 'rapidly changing and evolving' due to the pandemic.[10] However, the curve of confirmed COVID-19 cases in Ireland has flattened, thereby indicating a realistic possibility that the environment may recover, not worsen. Further, 'being not practical' should be determined by 'whether *at the date on which the application regarding service is made*, the applicant, using reasonable effort, [was] unable to serve the respondent personally (emphasis added)'[11] Additionally, the mere fact that Facebook was aware of the proceeding cannot suffice to satisfy the requirement of 'not practicable' in r 10.24.[12] Therefore, the court's reasoning that it is not practical to serve Facebook Ireland by forecasting the future change is not without doubts.

In conclusion, the *Facebook* court granted substituted service too lightly.

[1] The dispute centered on the 'This is your digital life' App (hereinafter 'APP'). The defendants allowed the APP to request information from the Facebook accounts of 305,000 Facebook Users globally who installed the APP, of which approximately 53 were Australian. They also allowed the APP to request the personal information of approximately 86,3000,000 Facebook Users globally (approximately 311,074 of whom were Australian Facebook Users) who were friends of the installers (that is, they did not install the APP themselves). The personal information the APP obtained from the defendants were released to third parties, including the Cambridge Analytica Ltd, and/or its parent company, for profit.

[2] The Hague Service Convention website page relating to Ireland describes the prescribed methods as '[p]ersonal or by post.' Ireland permits service of the court documents on individuals and entities in Ireland (e.g. Facebook Ireland) by post under the Hague Convention.

[3] *Facebook* [71].

[4] *Facebook,* [66].

[5] *Zeitouni*, [65]. There was no dispute that the Commissioner did not know the address(es) of the defendants. Though presumably in a position to provide information on the whereabouts of the defendants, their lawyers refrained from doing so. The Australian Federal Police had been looking for one brother who was in Indonesia for six months without success. For the other brother, the Commissioner only knew he was not in Australia but did not know where he went.

[6] *Australian Competition & Consumer Commission v Kokos International Pty Ltd* [2007] FCA 2035, [18]. Although ACCC knew that the defendant was likely in Japan, it had been unable to obtain an address at which he could be served. Neither the defendant nor his solicitors would provide an address for service. The Department of Foreign Affairs and Trade and Australia Embassy in Japan were unable to make inquiries on the ACCC's behalf. Therefore, the plaintiff could not make an attempt to serve the defendant in Japan. The court held that service was not practical, and a substitute service was granted under ord 7 r 9 of FCR 1979.

[7] *Oswal*, [35]–[36]. Mrs. Oswal was not in Australia. Her last known address was in the UAE, but she is also an Indian national and has business interests in Singapore. Consequently, it is not possible to know with certainty her whereabouts to effect personal service.

[8] Hague Service Convention art 1.

[9] Hague Conference on Private International Law, *Practical Handbook on the Operation of the Service Convention*, ed Christophe Bernasconia and Laurence Thébault (Wilson & Lafleur, 2006) [24]-[41].

[10] *Facebook* [66].

[11] *Foxe v Brown* [1984] HCA 69, [547] as applied in *O'Neil v Acott* (1988) 59 NTR 1, 2.

[12] *Morris v McConaghy Australia (No 4),* [2018] FCA 1516, [16]. The second defendant MC^2 was in the Cayman Islands. There was no dispute that MC^2 was aware of the originating process and had notice of the relevant court documents. However, the court required that the service must be conducted under the Hague Convention because the mere fact that the document has been brought to the attention of the party being served cannot suffice to satisfy r 48(a) (i.e. the requirement of 'not practical').