FEDERAL COURT OF AUSTRALIA

Dallas Buyers Club, LLC v iiNet Limited (No 1) [2014] FCA 1232

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| Citation: | Dallas Buyers Club, LLC v iiNet Limited (No 1) [2014] FCA 1232 |
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| Parties: | **DALLAS BUYERS CLUB, LLC v IINET LIMITED, INTERNODE PTY LTD, AMNET BROADBAND PTY LTD, DODO SERVICES PTY LTD, ADAM INTERNET PTY LTD and WIDEBAND NETWORKS PTY LTD**  |
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| File number: | NSD 1051 of 2014 |
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| Judge: | **PERRAM J** |
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| Date of judgment: | 17 November 2014 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – non-parties seeking access to restricted documents on the court file – whether access should be granted in the interests of the open administration of justice  |
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| Legislation: | *Evidence Act 1995* (Cth) ss 126H, 131A*Federal Court of Australia Act 1976* (Cth) s 17*Federal Court Rule*s *2011* (Cth) rr 2.32, 7.22  |
|  | *Privacy Act 1988* (Cth) Sch 1 Australian Privacy Principle 6 *Telecommunications Act 1997* (Cth) ss 276, 280 |
| Cases cited: | *Australian Securities and Investments Commission v P Dawson Nominees* (2008) 169 FCR 227 cited*Australian Securities and Investments Commission v Storm Financial Ltd (No 2)* [2009] FCA 928 cited*Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 3)* [2002] FCA 609 cited*Cain v Glass (No 2)* (1985) 3 NSWLR 230 cited*Hartnell v Commissioner of Taxation (No 1)* (2009) 254 ALR 71 cited*Hogan v Hinch* (2011) 243 CLR 506 cited*Jaffarie v Director General of Security* [2014] FCAFC 102 cited*John Fairfax & Sons Ltd v Cojuangco* (1998) 165 CLR 346 cited*Mobil Oil Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34 cited*Seven Network Ltd v News Ltd (No 9)* (2005) 148 FCR 1 cited*The Age Company Ltd v Liu* (2013)82 NSWLR 268 cited |
| Date of hearing: | The applications were considered in chambers.  |
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| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 19 |
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| Solicitor for the Applicant: | Marque Lawyers |
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| Solicitor for the Respondents: | Thomson Geer |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1051 of 2014 |

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| BETWEEN: | DALLAS BUYERS CLUB, LLCApplicant |
| AND: | IINET LIMITED First RespondentINTERNODE PTY LTDSecond RespondentAMNET BROADBAND PTY LTDThird RespondentDODO SERVICES PTY LTDFourth RespondentADAM INTERNET PTY LTDFifth RespondentWIDEBAND NETWORKS PTY LTDSixth Respondent |

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| JUDGE: | PERRAM J |
| DATE OF ORDER: | 17 NOVEMBER 2014 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The third party applications for access to restricted documents on the Court file be refused at this stage, except where access to the affidavit of Mr Phillips sworn 16 November 2014 and/or the notice to produce filed 3 November 2014 is sought.
2. Where the third party applicants seek access to unrestricted documents, access be granted.

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

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| JUDGE: | PERRAM J |
| DATE: | 17 NOVEMBER 2014 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

1. The Court has received several applications from the press and other interested parties for access to documents on the Court file. It is not the usual practice of the Court to publish reasons on the disposition of such applications but on this occasion I have thought it expedient to explain the course which I have concluded the Court should take.
2. The proceedings involve an application for preliminary discovery under Federal Court Rule 7.22. The applicant for preliminary discovery is the Dallas Buyers Club LLC which I assume is the owner of the copyright in Australia of the 2013 Jean-Marc Vallée film, Dallas Buyers Club, or an entity having the right to distribute that film in Australia. Despite David Stratton’s description of the film as being ‘a little bit hand-held at times’ albeit ‘not excessively so’, persons have apparently been downloading copies of it for use in Australia using peer-to-peer file sharing. The respondents to the application for preliminary discovery are several telecommunications companies providing broadband internet services to the public. I will call them ‘the internet service providers’. Dallas Buyers Club LLC has filed affidavits and an expert report in support of its application for preliminary discovery but, so far, none of this material has been used in open court. I have not been taken to it in open court nor, lacking any reason to do so, have I availed myself of the opportunity to inspect the material.
3. As I understand the suit, Dallas Buyers Club LLC will seek to show that it has identified the IP addresses of persons who have been involved in the file sharing of its film. The IP addresses which it has obtained sufficiently identify the internet service providers whose customers (or whose customers’ accounts) are being used to download the film but they do not identify the customers themselves. The thesis of the case, one assumes, is that the downloaders are infringing Dallas Buyers Club LLC’s copyright by downloading the film through peer-to-peer sites without its permission; that it has a right to sue those downloaders for infringing its copyright; and that the internet service providers can complete the picture for it by connecting the IP addresses it already has to the names of identifiable customers. Presumably armed with the customers’ names it then proposes to sue the actual infringers.
4. There are a number of interesting aspects to this. For example, many people will be interested to know – no doubt – how it is that Dallas Buyers Club LLC has obtained the IP addresses of the persons involved in downloading its film. The present inspection applicants are presumably amongst that class. Then, of course, there may be issues of privacy. Further, there may be issues as to whether the downloader and the customer are the same person and, assuming they are not, whether the latter should be responsible for the actions of the former.
5. Legally the present application rests on rule 7.22 of the *Federal Court Rules 2011* (Cth) which provides:

**7.22 Order for discovery to ascertain description of respondent**

(1) A prospective applicant may apply to the Court for an order under subrule (2) if the prospective applicant satisfies the Court that:

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

(b) the prospective applicant is unable to ascertain the description of the prospective respondent; and

(c) another person (the ***other person***):

 (i) knows or is likely to know the prospective respondent’s description; or

(ii) has, or is likely to have, or has had, or is likely to have had, control of a document that would help ascertain the prospective respondent’s description.

(2) If the Court is satisfied of the matters mentioned in subrule (1), the Court may order the other person:

(a) to attend before the Court to be examined orally only about the prospective respondent’s description; and

(b) to produce to the Court at that examination any document or thing in the person’s control relating to the prospective respondent’s description; and

(c) to give discovery to the prospective applicant of all documents that are or have been in the person’s control relating to the prospective respondent’s description.

Note 1: ***Control*** and ***description*** are defined in the Dictionary.

Note 2: For how discovery is to be made, see rule 7.25.

(3) The prospective applicant must provide the person with sufficient conduct money to permit the person to travel to the Court.

Note: ***Conduct money*** is defined in the Dictionary.

1. This rule has a venerable history of generating friction, which this case will no doubt augment. Persons suing for defamation have often enough sought to use it against journalists to identify their sources and this has led to tensions between the need to protect a plaintiff’s rights to seek redress for wrongs done to him or her and a desire to protect a journalist’s important obligation to maintain the confidentiality of his or her sources: see, for example Mr Cojuangco’s attempts to make the Sydney Morning Herald reveal the source of its story accusing him of being a crony of President Marcos and of having squandered US$9 billion of the Philippines’ foreign debt (*John Fairfax & Sons Ltd v Cojuangco* (1998) 165 CLR 346). The case of *The Age Company Ltd v Liu* (2013)82 NSWLR 268 is a more recent example; see also *Evidence Act 1995* (Cth), ss 126H and 131A.
2. So too in this case, there is a frisson between the right of the copyright owners to enforce their monopoly and the tenderness the internet service providers may feel in releasing information which many people would expect was unlikely ever to see the light of day. Support for that expectation may be found in Australian Privacy Principle 6 of the *Privacy Act 1988* (Cth) which, in broad terms, prevents disclosure of private information. On the other hand, Principle 6.2(b) makes clear that it provides no excuse for not complying with a Court order (see also *Telecommunications Act 1997* (Cth) ss 276 and 280). In any event, all of this lies in the future.
3. It is an important aspect of the administration of justice that it is conducted in public where it can be seen warts and all. Section 17 of the *Federal Court of Australia Act 1976* (Cth) requires that unless authorised by some other law, the jurisdiction of this Court is to be exercised in public. There are well known exceptions to this such as those which arise where it is necessary to protect the identity of an informer who might suffer retribution if identified in open court (*Cain v Glass (No 2)* (1985) 3 NSWLR 230; *Australian Securities and Investments Commission v P Dawson Nominees* (2008) 169 FCR 227; *Hogan v Hinch* (2011) 243 CLR 506 at 531 [21]), a trade secret the revelation of which might destroy a legitimate business advantage such as the secret recipe of eleven herbs and spices developed by Colonel Sanders for the preparation of southern fried chicken (*Mobil Oil Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34 at 38) or matters of national security such as who is spying on whom: cf. *Jaffarie v Director General of Security* [2014] FCAFC 102 at [23]-[25]. In each of these cases, some adjustment to the principle of open justice is accomodated but always strictly to the minimum extent necessary.
4. This Court has long provided a relatively straightforward mechanism for third parties – often journalists but not infrequently other persons too – to access this Court’s official file. That file is now, for new matters, entirely electronic and has ceased to have a physical existence. This has no legal implications for what is accessed but may have practical consequences in terms of ease of searching and so on. Access is dealt with by FCR 2.32. That rule recognises that there is one category of documents to which third parties should generally automatically have access. These are, in substance, the formal acts of the parties or the Court. The rules presume that these matters are, subject to a contrary order, in the public domain. The list is in FCR 2.32(2) and consists of originating processes, pleadings, applications, certain but not all notices, agreed statements of fact, reasons for judgment and the transcript of any proceedings heard in open court.
5. Of course, court files often contain very much more than these kinds of material. For example, at the moment the Court file in this case contains the following items:

(a) Originating application filed 14 October 2014;

(b) Affidavit of Daniel Macek affirmed 27 June 2014 and a CD being Exhibit DM 1\*;

(c) Expert report of Dr Richter filed 14 October 2014\*;

(d) Affidavit of Nathan Mattock sworn 20 October 2014\*;

(e) Six notices of address for service;

(f) Notice to produce filed by the respondents on 3 November 2014\*; and

(g) Affidavit of Graham Phillips sworn 16 November 2014\*.

1. Of those, the ones marked with an asterisk are not automatically available under FCR 2.32(2). Importantly, the evidence which has been filed by Dallas Buyers Club LLC is all of that nature. Presumably, somewhere in this material is the mechanism by which Dallas Buyers Club LLC has collected the IP addresses of the downloaders. No doubt, many people will be interested to understand the mysteries of this process, perhaps not all from a position of disinterest.
2. By FCR 2.32(4) a third party may apply for permission to inspect documents which are not automatically available. The Court has received applications from journalists at the ABC and CBS Interactive, as well as separate applications from the Australian Screen Association and a company called Softensity Pty Ltd for access to the affidavits, expert’s report, notice to produce and unrestricted documents such as the originating application.
3. The rules give a prima facie entitlement to third parties to access unrestricted documents and I can see no reason why access should not be granted to the documents presently on the file that fall into that category.
4. In relation to the restricted documents, because of the principle of open justice, it is the Court’s usual practice to release material which has been used in open court (*Seven Network Ltd v News Ltd (No 9)* (2005) 148 FCR 1 at 9 [27] per Sackville J) or, perhaps, otherwise used by a judge (*Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 3)* [2002] FCA 609 at [7] per Finkelstein J). I last looked at this question in *Hartnell v Commissioner of Taxation (No 1)* (2009) 254 ALR 71 where I collected (at 74 [9]) the authorities to that point since *Channel Seven*. Since then the same approach has been again followed in this Court: see *Australian Securities and Investments Commission v Storm Financial Ltd (No 2)* [2009] FCA 928 at [10] per Logan J.
5. In relation to evidence, however, which has not been utilised at the time of the third party application notions of open justice do not require the release of the material because there has not been, indeed there may never be, a public hearing.
6. On the other hand, because the interests of the parties to the litigation may often enough be adversely affected by the release of filed but as-yet-unused evidence, it is common for the Court to seek their views before acceding to a third party access request. Where no party to the litigation has any objection to the release of the material there will usually be no reason not to exercise the power under FCR 2.32(4) in favour of access. But a different approach may need to be taken where objection is raised.
7. In this case, the views of the parties were ascertained. Dallas Buyers Club LLC objected to access being granted to the affidavits or the expert report but the internet service providers did not, save that they did object to access being granted to Exhibit DM1 which allegedly contains a large number of IP addresses and about which they had some privacy concerns. No party specified an objection to access being granted to the notice to produce.
8. What happens when the preliminary discovery application is eventually heard on 17-18 February 2015 will all be in public. When the evidence in question is eventually used it is likely to be released under FCR 2.32(4) although there may be – I do not say that there definitely are – reasons not publicly to release the IP addresses. At the moment, however, it is all just material which has been filed. It may never be used or it may be subject to successful objection or confidentiality orders may be made with respect to it. Further, while no one can be sued for what they say in open court and the press is to free to report on what is said there, it is perhaps not completely obvious that those principles apply to evidence which has yet to see the inside of a courtroom and which may never do so.
9. In the present circumstances, I propose to refuse all four applications for access to the evidence which has been filed, except in relation to the affidavit of Mr Phillips which was used in Court at today’s directions hearing. The applications may be renewed when the material in question is used in open court. To the extent that unrestricted documents and the respondents’ notice to produce are sought, the applications will be allowed.

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

Associate:

Dated: 17 November 2014