Federal Court of Australia

Australian Communications and Media Authority v Jones [2022] FCA 546

|  |  |
| --- | --- |
| File number: | QUD 129 of 2022 |
|  |  |
| Judgment of: | **THOMAS J** |
|  |  |
| Date of judgment: | 10 May 2022 |
|  |  |
| Catchwords: | **PRACTICE AND PROCEDURE –** interlocutory application to dispense with personal service of originating process on the first respondent – application for substituted service on first respondent – *Federal Court Rules 2011* (Cth) r 10.24 **–** where personal service on first respondent not practicable – where reasonably probable the applicant’s identified methods of substituted service will inform the first respondent – orders made for substituted service |
|  |  |
| Legislation: | *Broadcasting Services Act 1992* (Cth)  *Federal Court Rules 2011* (Cth) |
|  |  |
| Cases cited: | *Australian Building and Construction Commissioner v Windus* [2019] FCA 1526  *Commissioner of Taxation v Caratti (No 2)* [2018] FCA 1500 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | Queensland |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Regulator and Consumer Protection |
|  |  |
| Number of paragraphs: | 15 |
|  |  |
| Date of hearing: | 10 May 2022 |
|  |  |
| Counsel for the Applicant: | Mr D Roche with Mr M Pulsford |
|  |  |
| Solicitor for the Applicant: | Australian Government Solicitor |
|  |  |
| Counsel for the First and Second Respondents: | There was no appearance by the First and Second Respondents |
|  |  |
| Solicitor for the Third Respondent: | Mr D Barker of McGinness & Associates Lawyers |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | QUD 129 of 2022 |
|  | | |
| BETWEEN: | AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY  Applicant | |
| AND: | RHYS EDWARD JONES  First Respondent  DIVERSE LINK PTY LTD ACN 641 292 088  Second Respondent  BRENTON LEE BUTTIGIEG  Third Respondent | |

|  |  |
| --- | --- |
| order made by: | THOMAS J |
| DATE OF ORDER: | 10 MAY 2022 |

THE COURT ORDERS THAT:

1. Pursuant to rule 10.24 of the *Federal Court Rules 2011* (Cth):
   1. the requirement for personal service of the following documents on the first respondent be dispensed with:
      1. the Originating Application dated 19 April 2022 (**Originating Application**); and
      2. the Concise Statement dated 19 April 2022

(together, the **Originating Documents**);

* 1. the Originating Documents are taken to have been served on the first respondent by the applicant taking all of the following steps on or before 12 May 2022:
     1. sending a copy of the Originating Documents by express registered post to the following address:

1. 126 Beelarong Street, Morningside, Queensland, 4170; and
2. 88 Elmes Road, Rocklea, Queensland, 4016.
   * 1. leaving a copy of the Originating Documents at the addresses listed in Orders 1(b)(i)(A) and 1(b)(i)(B);
     2. sending a copy of the Originating Documents by email to the email address [rhys.jones73@outlook.com](mailto:rhys.jones73@outlook.com);
     3. sending a text message to the telephone number 0421 789 979 in the following terms:

Proceedings have been started against you by the Australian Communications and Media Authority in the Federal Court of Australia, Queensland District Registry, proceeding number QUD 129/2022. On 10 May 2022, orders were made that the Originating Application dated 19 April 2022 and Concise Statement dated 19 April 2022 (together, “the Originating Documents”) are to be served on you by: sending a copy of the Originating Documents by registered express post to 126 Beelarong Street, Morningside, Queensland (“the Morningside address”), 4170 and 88 Elmes Road, Rocklea (“the Rocklea address”), Queensland, 4016; leaving a copy of the Originating Documents at the Morningside address and the Rocklea address; sending the Originating Documents to [rhys.jones73@outlook.com](mailto:rhys.jones73@outlook.com); and sending you this text message. Copies of the Originating Documents are available to inspect at the offices of the Australian Government Solicitor. You may also make other arrangements to receive copies of the Originating Documents by responding to this text or sending an email to [matthew.garey@ags.gov.au](mailto:matthew.garey@ags.gov.au). The proceedings are next listed for case management at the Federal Court of Australia at Brisbane on 29 June 2022 at 10.15 am.

* 1. on or before 12 May 2022, the applicant is to provide a copy of these Orders and Thomas J’s reasons for decision dated 10 May 2022 to the first respondent in accordance with the process in Orders 1(b)(i), 1(b)(ii) and 1(b)(iii).

**Reinstatement of Brisbane Poker Pty Ltd**

1. By 4.30 pm on 7 June 2022, the applicant is to file and serve any affidavit evidence in support of prayers 4 and 5 of the Originating Application.
2. By 4.30 pm on 21 June 2022, the applicant is to file and serve submissions no longer than five pages in length and any additional evidence in support of prayers 4 and 5 of the Originating Application.
3. In respect of Orders 2 and 3, the applicant is to effect service on the first respondent in accordance with the process in Orders 1(b)(i), 1(b)(ii) and 1(b)(iii).
4. The proceedings are listed for an interlocutory hearing on prayers 4 and 5 of the Originating Application and general case management at 10.15 am on 29 June 2022, to be conducted virtually unless otherwise ordered.
5. The parties have liberty to apply on three days’ notice for further directions.

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

REASONS FOR JUDGMENT

(delivered ex tempore and revised)

THOMAS J:

1. In this case, an order is sought pursuant to r 10.24 of the *Federal Court Rules 2011* (Cth) (the Rules) that, firstly, the requirement for personal service be dispensed with and, secondly, the documents are taken to have been served on the first respondent by taking steps which will be set out in an order.
2. Rule 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. Rule 10.24 deals with the situation where it is “not practicable to serve a document on a person in a way required by [the] Rules”. “Impracticability” must be assessed in the context of the facts, exigencies and circumstances of a particular case. Personal service will not be practicable if it is not sensible or realistic or if any attempt at personal service will obviously be futile.
2. Reference has been made to relevant authorities, one of which is *Commissioner of Taxation v Caratti (No 2)* [2018] FCA 1500. In that case, Colvin J said (at [10]):

The preponderance of authority is to the effect that the current rule requires the applicant for orders for substituted service to demonstrate that it is not sensible or realistic to effect personal service even though it may be possible or feasible to do so. This will usually be done by taking steps to effect personal service and providing evidence as to any difficulties that have arisen in doing so. It is not necessary to go so far as to demonstrate that there is an inability to effect personal service or that it would be extraordinarily difficult to do so. Further, there must be a proper evidential basis upon which to conclude that in all probability the mode of substituted service that is proposed will bring the relevant documents to the attention of the party to be served.

1. Counsel has also referred to an authority with respect to the mode of substituted service, assuming that the Court orders substituted service. In *Australian Building and Construction Commissioner v Windus* [2019] FCA 1526, Jackson J observed (at [8]):

An order for substituted service under r 10.24 must be based on a reasonable probability that the identified method of service will inform the intended recipient: *Statewide Secured Investments Pty Ltd v Tarrant* [2011] FCA 1067 at [10] (Flick J). Where experience has shown that a particular method of communication has resulted in material being brought to the attention of the person to be served, an order for substituted service according to that method will be likely to achieve the same result.

1. In an affidavit sworn by Mr Matthew Richard Garey, he refers (at [6]) to two possible addresses which were identified, namely:
2. 88 Elmes Road, Rocklea (this address was identified by reference to being the address of a company, Sports Memories Pty Ltd, of which the first respondent is director and secretary). The personal current and historical extract for Rhys Edward Jones is exhibited to that affidavit; and
3. 126 Beelarong Street, Morningside (this address was identified from an electoral roll search for the first respondent and also by reference to the company address for Brisbane Poker Pty Ltd, a deregistered company, of which the first respondent had been the sole director and company secretary).
4. An affidavit of Mr Leon Thach sets out efforts made to serve the first respondent personally at those addresses. Based on the responses from the people at each of those properties, I conclude that the first respondent cannot realistically be served personally at each of those properties.
5. I note that at least the person at 126 Beelarong Street, Morningside is in continued contact with the first respondent, from which I conclude it would be likely that documents left at the address for the first respondent would be received by the first respondent.
6. The affidavit of Mr Garey exhibits instructions to Mr Thach, which refer to a mobile telephone number used by the first respondent. The affidavit refers to an email address used by the first respondent.
7. Counsel has taken instructions from instructing solicitors to the effect that there is no evidence that the mobile telephone number is not in use. In [11] of his affidavit, Mr Garey swears to the fact that material produced in response to notices issued late last year by the Australian Communications and Media Authority (ACMA) under s 173 of the *Broadcasting Services Act 1992* (Cth) and sent to entities which included the Australia and New Zealand Banking Group, Bendigo and Adelaide Bank Limited, Commonwealth Bank of Australia, National Australia Bank Limited and Westpac Banking Corporation indicates that the first respondent uses the email address [rhys.jones73@outlook.com](mailto:rhys.jones73@outlook.com).
8. Based on the evidence, I conclude that the mobile telephone number which is identified in the instructions to Mr Thach is very likely the mobile number currently used by the first respondent. Again, based on the evidence, I conclude that the first respondent uses the email address [rhys.jones73@outlook.com](mailto:rhys.jones73@outlook.com).
9. As I have said, based on the affidavit by Mr Thach, I conclude that the first respondent will not realistically be served personally at either of the properties mentioned in [6] above.
10. The method of substituted service that is suggested in the draft order which has been provided includes posting to the addresses by registered post and forwarding to the email address.
11. In addition to forwarding the documents by registered post to the addresses, I also require these documents be delivered to those addresses for the first respondent, and that a text be sent to the mobile telephone number informing the first respondent of the proceeding that has been issued.
12. I conclude that, by taking the steps outlined, there is a reasonable probability that the first respondent will be informed of the existence and contents of the documents.

|  |
| --- |
| I certify that the preceding fifteen (15) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Thomas. |

Associate:

Dated: 11 May 2022