FEDERAL COURT OF AUSTRALIA

Humane Society International Inc v Kyodo Senpaku Kaisha Ltd

[2008] FCA 36

**HUMANE SOCIETY INTERNATIONAL INC v KYODO SENPAKU KAISHA LTD**

**OF**

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY | NSD 1519 OF 2004 |

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| BETWEEN: | HUMANE SOCIETY INTERNATIONAL INC  Applicant |
| AND: | KYODO SENPAKU KAISHA LTD  Respondent |
| JUDGE: | RARES J |
| DATE OF ORDER: | 18 JANUARY 2008 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The applicant have leave to serve sealed orders 1 and 2 made by Allsop J on 15 January 2008 (together with a copy of these orders, the notice of motion filed 17 January 2008 and the affidavit of Kirsty May Ferguson Ruddock affirmed 17 January 2006) on the respondent in Japan by substituted service as follows by:
   * + 1. serving the following documents:
          1. copies in English of the declaration and the injunction made by the Court and the reasons for judgment, together with a copy of these orders, the notice of motion filed 17 January 2008 and the affidavit of Kirsty May Ferguson Ruddock affirmed 17 January 2008;

(ii) copies in Japanese of the declaration and the injunction made by the Court;

(iii) an affidavit of the interpreter of the document in (ii) above certifying the interpretation, the affidavit being in both English and Japanese; and

(b) serving the documents referred to in paragraph (a) on the respondent by:

(i) sending via registered post addressed to the managing director of the respondent at the following address being the respondent’s registered place of business: 4-5, Toyomi-cho, Chuo-ku, Tokyo, Japan; and

(ii) serving the said documents at the respondent’s registered place of business: 4-5, Toyomi-cho, Chuo-ku, Tokyo, Japan.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| DISTRICT REGISTRY | OF |

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| BETWEEN: | HUMANE SOCIETY INTERNATIONAL INC  Applicant |
| AND: | KYODO SENPAKU KAISHA LTD  Respondent |

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| : |  |
| DATE: |  |
| PLACE: |  |

**REASONS FOR JUDGMENT**

1. On 15 January 2008 Allsop J made a declaration that the respondent had killed, injured, taken and interfered with Antarctic minke whales and fin whales and injured, taken and interfered with humpback whales in the Australian Whale Sanctuary in contravention of ss 229, 229A, 229B and 229C of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and had treated and possessed such whales killed or taken in the Australian Whale Sanctuary in contravention of ss 229D and 230 of the Act without permission or authorisation under ss 231, 232 or 238 of the Act. His Honour granted an injunction restraining the respondent from engaging in that conduct. At the same time his Honour delivered reasons for judgment: *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3.
2. The proceedings have had a considerable history concerning difficulties in finding an effective means of service on the respondent, which is substantively summarised in his Honour’s reasons. Ultimately his Honour granted an application for substituted service and ordered that the respondent be served with the originating process under O 7 r 9: *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124 at [6]-[14].
3. He concluded that on the evidence it was not possible or feasible to serve the process in Japan using diplomatic channels and that service, in accordance with the Rules, was impractical. In the substantive judgment his Honour further recounted difficulties that had been experienced in previous attempts to serve. There he said that he was satisfied that the applicant had served the relevant documents on the respondent according to the orders of 2 February 2007 and that the respondent was aware of the proceeding against it in the Court: *Humane Society* [2008] FCA 3 at [25].
4. In light of Allsop J’s having adverted to the question in his substantive judgment, during the course of the present application I raised a question about the attitude of the present government of the Commonwealth, there having been a change of government at a general election held on 24 November 2007. The present Attorney‑General has indicated in a letter to Allsop J’s associate, a copy of which was sent to the applicant, that the present government of the Commonwealth believes that the matter would be best considered by the Court without the government expressing its view. Indeed, that appears to be consistent with the reasoning of the Full Court on an earlier appeal from Allsop J’s initial disinclination to order service outside the jurisdiction: *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at 430 [11]-]13] per Black CJ and Finkelstein J.
5. The present application seeks, first, directions on the mode and sufficiency of service on the respondent of sealed orders. Secondly, it seeks that the applicant be granted leave to serve the sealed orders on the respondent in Japan by substituted service in effect by means replicating the order for substituted service made by Allsop J in February 2007 in respect of the original process.
6. It is not the function of the Court to give judicial advice as to the appropriate way in which proceedings may be served. The function of the Court is to hear and determine disputes and to make orders on the application of parties. The mode and sufficiency of service is a matter which may well be the subject of future litigation in the event that the respondent wishes to contest any attempt to enforce the orders sought to be made against it. There is a well recognised jurisdiction which the Court possesses to give advice and direction to its officers such as liquidators appointed by the Court, or trustees pursuant to statute. It would not be appropriate to make an order in terms of par 1 of the motion.
7. However, the applicant alternatively seeks an order in terms of par 2. The applicant has drawn my attention to two learned articles concerning service under the law of Japan, namely, McDonald AJ,‘Service of an Australian Originating Process in Japan’ (1992) 66 ALJ 810 especially at 816, and Gamertsfelder L, ‘Cross Border Litigation: Exploring the Difficulties Associated with Enforcing Australian Money Judgments in Japan’ (1998) 17 ABR 161 at 171. These make clear that in Japan service by mail or even personal service by a party will not be sufficient under the law of Japan to amount to service of court process. Apparently under the law of Japan, service is to be effected by the court as an act of assertion of its authority; anything falling short of that will not suffice for the purposes of the law of Japan.
8. Accordingly, if those views authoritatively reflect the law of Japan, a matter about which I say nothing, the applicant would not be able to comply with the provisions of O 8 rr 4 or 5. It seems to me that in the circumstances of this case I may comfortably be satisfied that it is impracticable to serve the orders in accordance with O 8. This is principally because on the material before me no relevant convention applies in Japan permitting the proposed mode of service, nor does the law of Japan support it. Attempts to serve the originating process through diplomatic channels have been met by the Japanese Government returning it on 26 October 2006 with a note to the Australian embassy that the documents would not be accepted on the stated ground that ‘this issue relates to waters and a matter over which Japan does not recognise Australian jurisdiction’: *Humane Society* [2008] FCA 3 at [20].
9. I am satisfied on that basis that it is impractical to comply with the rules for serving the documents in Japan and that I should make an order under O 7 r 9 to the effect sought by the applicant in par 2 of its notice of motion, with the addition that there be an affidavit from an interpreter verifying the accuracy of the translation of the orders proposed to be served as engrossed.

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| I certify that the preceding nine (9) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares. |

Associate:

Dated: 29 January 2008

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| Counsel for the Applicant: | C McGrath |
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| Solicitor for the | Environmental Defender’s Office (NSW) Ltd |
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|  | The Respondent did not appear. |
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| Date of Hearing: | 18 January 2008 |
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| Date of Judgment: | 18 January 2008 |