

FEDERAL COURT OF AUSTRALIA

Yemini v Twitter International Company [2022] FCA 318

File number(s): VID 70 of 2022

Judgment of: **MORTIMER J**

Date of judgment: 31 March 2022

Catchwords: **PRACTICE AND PROCEDURE** – application for leave to serve originating application seeking preliminary discovery outside Australia pursuant to Div 10.4 of the *Federal Court Rules 2011* (Cth) – effective application for leave for substituted service – leave to serve outside Australia granted – leave to serve via substituted service refused

Legislation: *Federal Court Rules 2011* (Cth), rr 7.22, 10.42, 10.43
Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters done at the Hague on 15 November 1965, Art 10

Cases cited: *Lin v Google LLC* [2021] FCA 1113

Division: General Division

Registry: Victoria

National Practice Area: Other Federal Jurisdiction

Number of paragraphs: 6

Date of hearing: Determined on the papers

Solicitor for the Prospective Applicant: Mr S Gibson of Macpherson Kelley

ORDERS

VID 70 of 2022

BETWEEN: **AVRAHAM YEMINI**
Prospective Applicant

AND: **TWITTER INTERNATIONAL COMPANY**
First Prospective Respondent

TWITTER INC.
Second Prospective Respondent

ORDER MADE BY: MORTIMER J

DATE OF ORDER: 31 MARCH 2022

THE COURT ORDERS THAT:

1. Pursuant to r 10.42 and r 10.43 of the *Federal Court Rules 2011* (Cth), the Prospective Applicant has leave to serve:

- (a) the Originating Application by a Prospective Applicant for an Order for Discovery, dated 15 February 2022;
- (b) the affidavit of Stuart Gibson sworn on 15 February 2022; and
- (c) a copy of these orders,

upon the Prospective Respondents in the United States of America and in Ireland, 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 by the Prospective Applicant, to the Prospective Respondents’ addresses at:

First Prospective Respondent

Twitter International Company

1 Cumberland Place

Fenian Street

DUBLIN 2

D02 AX07

IRELAND

Second Prospective Respondent

Twitter Inc.

1355 Market Street, Suite 900

San Francisco, CA 94103

2. Costs be reserved.
3. The matter be listed for a case management hearing on a date to be fixed by the Court, no sooner than 14 days after the filing of an affidavit of service by the Prospective Applicant.

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

REASONS FOR JUDGMENT

MORTIMER J:

1 The prospective applicant in this proceeding, Mr Avraham Yemini, is an Australian-based journalist for the Canadian news and opinion website, Rebel News. On 16 February 2022, Mr Yemini filed an originating application effectively seeking an order under r 7.22 of the *Federal Court Rules 2011* (Cth) for preliminary discovery by **Twitter International Company** and **Twitter Inc**, the corporate entities through which the American microblogging and social networking service ‘Twitter’ is principally operated. Mr Yemini seeks production of documents in the possession of Twitter International or Twitter Inc that would help him identify an anonymous person or persons who published allegedly defamatory content about Mr Yemini on the Twitter platform, so that he can commence proceedings against that person or persons. The evidence supporting Mr Yemini’s application for preliminary discovery sets out the bases on which Mr Yemini believes that one or both of the Twitter entities have information about the identity of the anonymous Twitter user and the attempts that Mr Yemini has made to identify the anonymous user to date.

2 The prospective respondents to this proceeding are based outside of Australia. Twitter International’s registered office is located in the Republic of Ireland and Twitter Inc is domiciled in California, USA. As such, Mr Yemini requires the Court’s leave to effect service of this proceeding’s originating process: r 10.43(1)(a) of the Rules. Mr Yemini applied for leave to serve Twitter International and Twitter Inc in accordance with 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 Convention**) and, additionally, by email. Leave will be granted to effect service in a manner permitted by the Hague Convention, but not by email.

3 As Wigney J set out in *Lin v Google LLC* [2021] FCA 1113 at [12], the combined effect of r 10.42 and r 10.43 of the Rules is to impose five requirements for an applicant seeking leave to effect service overseas. First, the applicant must show that the application to be served comprises, or includes, one or more of the kinds of proceedings mentioned in the table produced in r 10.42 (r 10.42 and r 10.43(4)(b) of the Rules). Second, the applicant must show that the means by which they propose to effect service accords with a convention, the Hague Convention or the law of the foreign country in which service is to be effected (r 10.43(2) of the Rules). Third, the application must be accompanied by an affidavit stating

the name of the foreign country where the prospective respondent is to be served and that the proposed method of service accords with a convention, the Hague Convention or the law of the foreign country (r 10.43(3) of the Rules). Fourth, the Court must have jurisdiction in the proceeding (r 10.43(4)(a) of the Rules). Fifth, the applicant must have a prima facie case for all or any of the relief claimed in the proceeding (r 10.43(4)(c) of the Rules).

4 On the material before the Court, I am satisfied that each of the five criteria is fulfilled. Mr Yemini's application is for preliminary discovery, effectively under r 7.22 of the Rules, is based on a cause of action in defamation. With respect, I concur with the observations of Wigney J in *Lin* at [13]-[16] that an application for preliminary discovery in these circumstances can be a proceeding of the kind mentioned in items 1, 4 and 5 of the table in r 10.42 of the Rules. Mr Yemini sought leave to effect service via international registered post, which is a method of service permitted by Article 10(a) of the Hague Convention. Neither the USA nor the Republic of Ireland has made an objection to service via registered post under Article 10(a) of the Hague Convention. Mr Yemini's application for overseas service was accompanied by an affidavit duly sworn by his solicitor, deposing to the names of the countries in which Twitter International and Twitter Inc are to be served (the Republic of Ireland and the USA, respectively) and the method of service to be employed (affidavit of Stuart John Gibson sworn on 22 March 2022 at [8]-[19]). An application for preliminary discovery under r 7.22 of the Rules is a proceeding in which this Court has jurisdiction. On the basis of the affidavit filed in support of the application for preliminary discovery, I am satisfied that Mr Yemini has a prima facie case for the production of the documents he seeks. Therefore, an order granting leave for Mr Yemini to effect service on the prospective respondents via international registered post will be made.

5 However, leave for Mr Yemini to effect service on the prospective respondents via email will be refused. Email is not a method of service of an originating process permitted under the Hague Convention. An order permitting overseas service via email would effectively be an order for substituted service under r 10.24 of the Rules. Mr Yemini provided no evidence as to why an order for substituted service would be necessary or appropriate in the circumstances of this application. In that respect, the facts of this application are similar to those in *Lin*. I respectfully agree with the observations of Wigney J in *Lin* at [31]-[38], especially his Honour's remarks at [38]:

There is an applicable agreed regime for service outside the jurisdiction. That regime, the Hague Convention, does not permit service by email. The agreed regime is

subverted where jurisdiction is exercised permitting a party to substitute an alternative form of service: cf *Laurie v Carroll* (1958) 98 CLR 310 at 325; *AIC v Facebook* [[2020] FCA 531; 144 ACSR 88] at [72]. The interests of international comity weigh against permitting service via email in the absence of compelling evidence as to why service in accordance with the Hague Convention is unlikely to be successful or feasible in all the circumstances. There is no such evidence in this case.

6 Leave will be granted to Mr Yemini for service outside Australia in accordance with Div 10.4 of the Rules. The application for service by email is refused. The costs of this application should be reserved.

I certify that the preceding six (6) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Mortimer.

Associate:

Dated: 31 March 2022