Federal Court of Australia

Kandola v Google LLC (No 2) [2021] FCA 1412

|  |  |
| --- | --- |
| File number(s): | NSD 865 of 2021 |
|  |  |
| Judgment of: | **CHEESEMAN J** |
|  |  |
| Date of judgment: | 12 November 2021 |
|  |  |
| Catchwords: | **PRACTICE AND PROCEDURE** – application for preliminary discovery pursuant to r 7.22 of the *Federal Court Rules 2011* (Cth) – preliminary discovery sought in aid of commencing defamation proceedings arising from allegedly defamatory comments made online – first prospective respondent served but did not appear – application granted. |
|  |  |
| Legislation: | *Federal Court Rules 2011* (Cth), rr 7.22(1), 10.42 and 10.43 |
|  |  |
| Cases cited: | *Kandola v Google LLC* [2021] FCA 1262  *Musicki v Google LLC* [2021] FCA 1393 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | New South Wales |
|  |  |
| National Practice Area: | Other Federal Jurisdiction |
|  |  |
| Number of paragraphs: | 17 |
|  |  |
| Date of hearing: | 12 November 2021 |
|  |  |
| Counsel for the Prospective Applicants: | Ms R Kandola appeared for the prospective applicants |
|  |  |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NSD 865 of 2021 |
|  | | |
| BETWEEN: | MR TEJINDER SINGH KANDOLA  First Prospective Applicant  MS RACHEL KANDOLA  Second Prospective Applicant | |
| AND: | GOOGLE LLC  First Prospective Respondent  THRYV AUSTRALIA PTY LTD  Second Prospective Respondent | |

|  |  |
| --- | --- |
| order made by: | CHEESEMAN J |
| DATE OF ORDER: | 12 NOVEMBER 2021 |

THE COURT ORDERS THAT:

1. As soon as is reasonably practicable and in any event within 15 days of being served with this order by email in accordance with order 2, the first prospective respondent, **Google** LLC, shall provide to the prospective applicants by email to rachel@unicornair.com.au, the following information, to the extent that such information is available, in relation to the Google Search and Map reviews of Unicorn Air Conditioning & Refrigeration Pty Ltd linked with the Google **Accounts**:
   1. ‘Frank H’ - https://www.google.com/maps/contrib/104300273246642518122/reviews/@-33.7201367,151.0988577,13z/data=!3m1!4b1!4m3!8m2!3m1!1e1?hl=en-AU
   2. ‘John S’ - https://www.google.com/maps/contrib/114831197671603278714/photos/@-33.7356666,151.1286799,15z/data=!4m3!8m2!3m1!1e1?hl=en-AU

the subscriber information for the Accounts, including;

* + 1. the name of the users;
    2. account creation information;
    3. email addresses;
    4. the IP addresses of logins;
    5. associated timestamps;
    6. telephone numbers;
    7. location metadata; and
    8. other identifying details of other accounts originating from the same IP address, email address, and telephone number.

1. Pursuant to rr 10.42 and 10.43 of the *Federal Court Rules**2011* (Cth), the prospective applicants be granted leave to serve this order, and the Court’s reasons for judgment once published (together, **the Documents**) upon Google in the United States of America 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, by sending the Documents using international registered post, with an acknowledgment of receipt to be provided by Google to the prospective applicants, addressed to:
   1. Google LLC

C/O Custodian of Records 1600 Amphitheatre Parkway

Mountain View, California 94043 United States of America

and by sending the Documents by email to Google at the following addresses:

* 1. google-legal-support@google.com; and
  2. internationalcivil@google.com

1. No order as to the costs of the present application.

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

REASONS FOR JUDGMENT

(Revised from transcript)

CHEESEMAN J:

1. These proceedings concern an application for preliminary discovery by the prospective applicants, Ms Rachel Kandola and Mr Tejinder Singh Kandola, against **Google** LLC and Sensis Pty Ltd, now trading as **Thryv** Australia Pty Ltd. The prospective applicants own and operate a business called **Unicorn** Air Conditioning & Refrigeration Pty Ltd and seek information from the prospective respondents in relation to reviews posted by ‘John S’ and ‘Frank H’ on the websites of Google and the Yellow Pages (which is operated by Thryv) respectively. On 27 October 2021, I made orders that Thryv provide preliminary discovery to the prospective applicants. These reasons address the relief sought by the prospective applicants against Google.
2. In support of their application, the prospective applicants rely on the following:
3. Affidavit of Rachel Kandola affirmed 21 August 2021;
4. Affidavit of Tejinder Singh Kandola affirmed 21 August 2021;
5. Affidavit of service of Rachel Kandola affirmed 8 November 2021; and
6. Correspondence exchanged between Ms Kandola and Google on 9 November 2021.

# BACKGROUND

1. A brief background to the proceedings is set out at paragraphs [4] and [5] of *Kandola v Google LLC* [2021] FCA 1262 (***Kandola (No 1)***).It is not necessary to repeat that summary except to note that Ms Kandola has given evidence that the prospective applicants have operated Unicorn since 2009 and in that time the business has built what she asserts to be an impeccable reputation and one that is closely associated with Mr Kandola and herself as individuals. The prospective applicants consider the contents of the reviews published on the Google and Yellow Pages websites to be false and defamatory in respect of both Unicorn and each of them. They are concerned the reviews will be accessed by clients (including presumably potential clients) of Unicorn with the result that the reputation of Unicorn and each of the prospective applicants will be damaged.
2. Prior to commencing these proceedings, the prospective applicants put Google on notice that they regarded the reviews to be defamatory and to have been posted by individuals who were not in fact customers of Unicorn. The prospective applicants made multiple requests to Google, through the later part of 2020, seeking to have the purported reviews removed.   
   On 18 December 2020, they requested Google to identify the authors of the reviews to enable communication between the prospective applicants and the individuals who posted the reviews. Google refused to do so. The prospective applicants subsequently commenced these proceedings on 21 August 2021.
3. On 14 October 2021, I made orders permitting the prospective applicants to serve their application for preliminary discovery on Google out of jurisdiction in accordance with rr 10.42 and 10.43 of the *Federal Court* ***Rules*** *2011* (Cth): *(Kandola (No 1))*. Ms Kandola has filed an affidavit of service in respect of the steps taken to give notice of these proceedings to Google. In that affidavit, Ms Kandola deposes that, pursuant to orders made by the Court on   
   14 October 2021, she posted to Google on 14 October 2021, by international registered post, the following documents: a copy of the Court’s orders, the originating application and the affidavits of the prospective applicants, both affirmed on 21 August 2021 (collectively, the **Documents**). She deposes that she also emailed the Documents to Google’s email address, internationalcivil@google.com, notifying Google that the Documents had also been mailed and providing them with the tracking number provided by Australia Post.
4. The Documents were successfully delivered by registered international post to Google’s address for service on 22 October 2021. The delivery notification from Australia Post is in evidence.
5. On 4 November 2021 I convened a case management hearing of these proceedings. The listing for that case management hearing was one of the orders made on 14 October 2021 and was included in the Documents served on Google. No legal representative for Google sought to appear at the case management hearing. Further, to date, no address for service for Google has been filed with the Court.
6. Following the case management hearing, Ms Kandola made a further attempt on   
   5 November 2021 to contact Google through an alternative email address being google-legal-support@google.com. Ms Kandola received an automated reply email but no further substantive response to that correspondence.
7. On 9 November 2021, after several attempts by Ms Kandola to contact Google, Google responded via its email address internationalcivil@google.com. In that correspondence Google informed Ms Kandola:

“Google does not intend to appear in the proceeding nor submit to the jurisdiction of the court. However, if an acceptable form of orders can be agreed, Google would be prepared to comply with those orders on a voluntary basis, subject to the matters raised below…”

1. Ms Kandola responded proposing alternative consent orders to Google by email on the same day. In accordance with a direction made, Ms Kandola notified Google of the hearing scheduled for today, if the matter did not resolve prior, and provided a copy of orders of the Court made on 10 November 2021. Ms Kandola has not received any further correspondence from Google since the 9 November 2021 email.

# LEGAL PRINCIPLES

1. Rule 7.22(1) of the Rules relevantly 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.

1. In a recent decision of this Court, Mortimer J reviewed the authorities setting out the applicable principles in an application for preliminary discovery: ***Musicki*** *v Google LLC* [2021] FCA 1393 at [3]. Her Honour summarised the basic requirements the Court must be satisfied of at [4]:

4 The three basic requirements are that the 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, notwithstanding having made reasonable enquiries and taken any other steps reasonably required in the circumstances, to ascertain a description of the prospective respondent; and

(c)    another person, the respondent to the application for preliminary discovery, knows or is likely to know that description, or has or was likely to have had, control of a document that would help ascertain that description.

# CONSIDERATION

1. I am satisfied, on the evidence, that Ms Kandola has demonstrated that the prospective applicants *may* have a right to relief, by way of proceedings for defamation. Having read the impugned reviews and considered the evidence on which the prospective applicants rely, I am satisfied that threshold is met.
2. Further, there is evidence that Ms Kandola has made reasonable enquiries to try to ascertain the identity of the prospective respondents including by attempting to correspond with Google prior to commencing these proceedings. Ms Kandola, on behalf of both the prospective applicants, has taken reasonable steps in using the communication channels that Google promotes as being available, prior to commencing the present proceedings.
3. I am satisfied Google is likely to have the identification information the prospective applicants require to commence proceedings, namely the description of the identity of   
   ‘John S’ and ‘Frank H’, or has, or is likely to have, control of a document that would assist the prospective applicants to ascertain that description.
4. Accordingly, I am satisfied that orders for preliminary discovery in the form sought by the prospective applicants be made pursuant to r 7.22(1) of the Rules.
5. Ms Kandola relies on the approach taken by this Court in *Musicki* as to service of the orders made on Google. In *Musicki* evidence was given, and was accepted by this Court, that “Google has a policy or practice of not responding to requests of this kind without a Court order”.In the circumstances, Mortimer J considered it appropriate to order service not only by international registered post, but also by email to Google’s dedicated civil proceedings email address. There is evidence to similar effect before me. Accordingly, I am prepared to adopt that approach in this case and make orders accordingly.

|  |
| --- |
| I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Cheeseman. |

Associate:

Dated: 12 November 2021