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The Court Can't Even Handle Me

Flo Rida and the Lessons for Substituted Service via Social Media

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Introduction

The prolific growth in social networking sites such as Facebook and Twitter have made them a significant part of our daily lives. The legal environment has not been immune. One such area has been the use of social media to effect substituted service. This has however not been without controversy. In a recent decision, American rapper, Flo Rida was successful in his appeal to have an order for substituted service via email and Facebook set aside.¹ While the decision does not eliminate the possibility of substituted service via social media, it does provide useful guidance as to its use and limitations. The article explores this recent decision as well as the relevant Australian rules and authorities relating to substituted service via social media.

Substituted Service via Social Media

There is a growing body of case law that considers substituted service in a number of different forms.² However it was not until 2008 that an Australian court first considered substituted service via a social networking site.

In this pioneering decision, Master Harper of the Supreme Court of the Australian Capital Territory allowed default judgment to be served on the Facebook profiles of two defendants unable to be located.³ Notably, the Court was satisfied that the relevant Facebook accounts were in fact those of the defendants. Interestingly, in the same year, Ryrice DCJ of the District Court of Queensland, in *Citigroup Pty Ltd v Weerakoon*, refused an application for substituted service via the same method.⁴ Her Honour held:

I am not so satisfied in light of looking at the ... uncertainty of Facebook pages, the facts that anyone can create an identity that could mimic the true person's identity and indeed some of the information that is provided there does not show me with any real force that the person who created the Facebook page might indeed be the defendant, even though practically speaking it may well indeed be the person who is the defendant.⁵

Despite this reluctance by Ryrice DCJ, the recent decision in *Flo Rida v Mothership Music* has again enlivened the debate.⁶ Mothership Music commenced proceedings against Flo Rida and his management agent in the District Court of New South Wales for damages for breach of contract resulting from the rapper's failure to appear at a music festival in Newcastle. After unsuccessful attempts to serve Flo Rida during a visit by him to Australia, the plaintiff sought an order for substituted service. Gibson DCJ ordered that substituted service be effected on Flo Rida by email and a notice to be posted on his Facebook page.⁷ Following service in the ordered form, neither Flo Rida nor his management agent appeared and default judgment was entered.

Flo Rida appealed to the New South Wales Court of Appeal to have the order for substituted service and judgment set aside. The main contention was that the District Court did not have jurisdiction to make the order for substituted service. Macfarlan JA, with whom Ward and Gleeson JJA agreed, allowed the appeal. His Honour held that the District Court, as an inferior court, attracted its territorial jurisdiction from due service.⁸ Therefore for the Court to have jurisdiction, the order for substituted service must have been properly made. His Honour held it was not.⁹ This was due to the District

Court's lack of jurisdiction based on personal service outside Australia, combined with insufficient evidence to establish that service via Facebook would have brought the proceedings to Flo Rida's attention prior to his imminent departure abroad.¹⁰ Accordingly, the order for substituted service and judgment were set aside.

KEY CONSIDERATIONS

The above discussion of the Australian authorities reveal three key considerations relevant to substituted service via social media. These are discussed below.

Jurisdiction

As highlighted in *Flo Rida*, the court initiating the process must have jurisdiction to make an order for substituted service. This is largely uncontroversial where the defendant is within Australia.¹¹ The position is more interesting where the defendant is abroad. In this case, where a process originating in a particular court cannot be served outside Australia – such as a process originating in the District Court of New South Wales¹² – substituted service cannot be ordered against a defendant located abroad.¹³ This is because the test for allowing substituted service is where personal service is “impracticable”¹⁴ and does not extend to defeat where personal service is unlawful.¹⁵ Indeed, in *ASIC v Sweeney (No 2)* Austin J indicated that substituted service should not be used as a “means of sidestepping the obstacles to personal service abroad”.¹⁶

Therefore to overcome this hurdle, an applicant must either commence proceedings in a court that allows service of process outside Australia,¹⁷ or prove that substituted service of the process will be brought to the defendant's attention within Australia.¹⁸ In the social media context, the latter will need to be achieved by establishing that the defendant will access the relevant notice¹⁹ while within Australia. Consequently, while social media operates in a seamless environment free from geographical norms, a considerably more tempered approach is necessary in order to comply with the jurisdictional requirements of service of process.

Identity

A further issue highlighted by the Australian authorities is the need to establish that a particular Facebook page is in fact that of the defendant. This formed a significant aspect of Ryrie DCJ's decision in *Weerakoon* and was also discussed, in *obiter*, by MacFarlan JA in *Flo Rida*.²⁰ It is therefore relevant to consider how proof of identity can be established in an online environment where anonymity can often be achieved with ease.

With respect to Facebook, there are certain elements of a Facebook page that can assist in the identification process. First, it is possible to obtain a Facebook user's date of birth, email address and city of residence. Although not decisive, this information can be matched with that of the defendant. The profile picture appearing on the Facebook page may also be of assistance. However, access to such content is controlled by the Facebook user and may often be restricted. Furthermore,

even where such information is available, its probity is questionable.²¹ Despite Facebook's terms prohibiting the use of false personal information,²² it does not serve as an insurmountable obstacle for the creation of a fictitious page.²³

While these considerations do present difficulties, they should not be seen to entirely preclude service via social networking sites. For example, it is conceivable to have parties with a pre-existing relationship, which includes social networking. In these circumstances, proof of identity will be easier to establish. There might, for example, be photographs of both parties together or records of previous messages and conversations. In relation to celebrities, both Facebook and Twitter have adopted “verified accounts” where a blue tick is placed on the account. This denotes that the identity of the user has been verified.²⁴

Attention in a timely manner

Additionally, service via social media must bring the proceedings to the defendant's attention in a timely manner.²⁵ This will primarily involve the need to establish that the defendant is a frequent user of the particular site. In relation to Facebook, this could be established through evidence of frequent posts or ‘status’ updates on their page, while the same might be established from a Twitter user's propensity to ‘tweet’.

An example of this requirement being satisfied was in 2010 where it was reported that Victorian police had successfully obtained a court order to serve an alleged cyber bully via Facebook.²⁶ In this case it was reported that the defendant was a “prolific” user of Facebook that had used the site to harass, bully and threaten another person.

Unique considerations however exist when dealing with celebrities, such as Flo Rida. First, it is important to recognise that often the social networking sites of celebrities will not be controlled by them personally, but rather by their management. Additionally, such sites will often be flooded with fan messages that might make it difficult to identify the message in relation to service. It is therefore necessary for a court to be satisfied that effecting service via such a method will indeed bring the proceedings to the defendant's attention in a timely manner.

Conclusion

Although, Australian courts have been slow to accept the ubiquity of social media in society, there have been a number of developments that acknowledge the possibility of substituted service using social networking sites. The article has discussed three key considerations that arise in this context. First, it is essential that a court making an order for substituted service via social media have jurisdiction to do so. Secondly, an applicant will need to prove that a particular social networking page belongs to the defendant; and finally, that substituted service to that page will bring the proceedings to the defendant's attention in a timely manner. Social media

should therefore be seen as a useful tool for effecting substituted service, in the appropriate circumstances.

¹ *Flo Rida v Mothership Music Pty Ltd* [2013] NSWCA 268.

² For example, the courts have allowed substituted service by post: *Commonwealth Bank of Australia v Diplock* [2010] QSC 146; email: *Australia Credit Union v Cruickshank* [2011] QDC 89; mobile text message: *Muir v Hunter* [2011] QDC 290; and newspaper advertisement: *Thomas v Yeanoulatos* [2010] QDC 67.

³ *MKM Capital Pty Ltd v Corbo & Poyser* (Unreported, Master Harper, Supreme Court of the Australian Capital Territory, Master Harper, 12 December 2008); discussed in Nick Abrahams, 'Australian court serves documents via Facebook', *The Sydney Morning Herald* (12 December 2008).

⁴ [2008] QDC 174.

⁵ *Ibid.*

⁶ *Flo Rida v Mothership Music Pty Ltd* [2013] NSWCA 268.

⁷ The particulars of the Facebook post are contained in Order 4(b) of her Honour's judgment – quoted by Macfarlan JA [2013] NSWCA 268 at [15].

⁸ Pursuant to s 47 of the *District Court Act 1973* (NSW); [2013] NSWCA 268 at [19].

⁹ [2013] NSWCA 268 at [37].

¹⁰ [2013] NSWCA 268 at [31], [37].

¹¹ This primarily requires the applicant to establish that personal service is "impracticable": *CPR 2006* (ACT) r 6460; *FCR 2011* r 10.24; *UCPR* (NSW) Reg 10.14; *SCR* (NT) r 6.09; *UCPR* (Qld) s 116; *SCCR 2006* (SA) r 69; *SCR 2000* (Tas) r 141; *SC(GCP)R 2005* (Vic) r 6.10; *RSC 1971* (WA) O 72 r 4; Section 15 of the *Service and Execution of Process Act 1992* (Cth) allows for service to be effected anywhere in Australia.

¹² Part 11 of the *UCPR* (NSW), which deals with service of process outside Australia, only applies to the Supreme Court: *UCPR* (NSW) Reg 11.1.

¹³ *Flo Rida v Mothership Music Pty Ltd* [2013] NSWCA 268 at [35], [37].

¹⁴ Service has generally been considered 'impracticable' where the plaintiff proves that there are difficulties associated with effecting service in the normal manner: *Paragon Group Ltd v Burnell* [1991] 2 All ER 388; *Embrey v Smart* [2013] QSC 241.

¹⁵ *Flo Rida v Mothership Music Pty Ltd* [2013] NSWCA 268 at [35], [37].

¹⁶ *ASIC v Sweeney (No 2)* [2001] NSWSC 477 at [41].

¹⁷ *FCR 1979* O 8; *CPR 2006* (ACT) r 6501; *UCPR* (NSW) Pt 11, Div 1 and Sch 6; *SCR* (NT) O 7; *UCPR 1999* (Qld) Ch 4 Pt 7 r 124; *SCCR 2006* (SA) r 40; *SCR 2000* (Tas) Div 10; *SC (GCP)R 2005* (Vic) O 7; *RSC 1971* (WA) O 10.

¹⁸ *Flo Rida v Mothership Music Pty Ltd* [2013] NSWCA 268 at [37].

¹⁹ This could be a Facebook post or private message, a tweet on Twitter, etc.

²⁰ [2013] NSWCA 268 at [38].

²¹ As was indicated by Ryrice DCJ in *Citigroup Pty Ltd v Weerakoon* [2008] QDC 174.

²² Available at www.facebook.com/legal/terms.

²³ See, Riva Richmond, *Stolen Facebook Accounts for Sale*, *The New York Times* (3 May 2010) p B3, for a discussion of emerging black markets for stolen Facebook accounts.

²⁴ Facebook's policy is available at www.facebook.com/help/196050490547892; Twitter's policy is available at <http://support.twitter.com/articles/119135-faqs-about-verified-accounts>.

²⁵ *Flo Rida v Mothership Music Pty Ltd* [2013] NSWCA 268 at [38].

²⁶ *Australian police serve court order via Facebook*, *The Sydney Morning Herald* (10 October 2010).