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Court Stems Tide of Futile 'King Canute' Order

Sophie Dawson, Ben Teeger & Tanvi Mehta take a look at a recent decision by the Supreme Court of New South Wales (Court of Criminal Appeal) which set aside a 'King Canute' order made in relation to criminal proceedings involving Fadi Ibrahim, Michael Ibrahim, and Rodney Atkinson.

This article considers the necessity and effectiveness of such orders, as well as implications for internet content hosts and search engine operators.

In brief

On 13 June 2012, his Honour Chief Justice Bathurst and their Honours Justices Basten and Whealy of the Supreme Court of New South Wales (Court of Criminal Appeal) (***Court***), unanimously set aside a suppression order made by the District Court of New South Wales on 26 March 2012 (***Order***) on the ground that it was made beyond the power conferred by the *Court Suppression and Non-Publication Orders Act 2010* (NSW) (***Act***).[1]

The decision sheds light on how Courts are likely to interpret the requirement that a suppression or non-publication order directed towards an internet content host or search engine operator (a so-called 'King Canute' order) is 'necessary to prevent prejudice to the proper administration of justice' under section 8 of the Act.

Scope of order

The Order was made by his Honour Judge Bennett SC of the District Court in the context of criminal proceedings involving Fadi Ibrahim, Michael Ibrahim and Rodney Atkinson (the ***Accused***).

The Order sought to prevent the disclosure and publication of material which contained references to other criminal proceedings in which the Accused are or were parties or witnesses, and other alleged unlawful conduct in respect of which the Accused are or were suspected to be complicit in or to have knowledge. The purpose of the Order was to prevent jurors in the criminal proceedings from accessing such material.

The appeal to the Court to set aside the Order was made by eight media companies operating in Australia (six of which operate web sites), including Fairfax, News, the Australian Broadcasting Corporation, Yahoo!7, Seven Network and Ninemsn.

Whether order 'necessary' to prevent prejudice to administration of justice

The Court set aside the Order on the ground that it was not 'necessary to prevent prejudice to the proper administration of justice' as required by section 8(1)(a) of the Act.

In determining the meaning to be given to the term 'necessary' under the Act, the Court distinguished between orders which constrain the publication of material which:

- is disclosed in court proceedings, a suppression order in relation to which involves a constraint upon the principle of open justice and impinges the media's ability to publish what happens at trial; and

1 *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125.

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- has no connection with court proceedings except its capacity to affect current or future proceedings, a suppression order in relation to which does *not* involve a constraint upon the principle of open justice or impinge the media's ability to publish what happens at trial.

Notwithstanding its adoption of the broad interpretation of the term 'necessary' referred to above, the Court held that a suppression or non-publication order will fail the necessity test if it is 'futile' or 'ineffective'.[11]

The Court held that where an order seeks to constrain the disclosure or publication of material falling within the second category above, the term 'necessary' is to be construed broadly, such that an order is necessary 'so long as it is reasonably appropriate and adapted to achieve its perceived purpose'.[2] The Court stated that although it is not sufficient for the order to be 'merely reasonable or sensible, the word "necessary" should not be given a narrow construction'.[3] In doing so, the Court followed its previous authority in *R v Perish*[4] and *R v Debs*[5], which can be contrasted with the decisions of the High Court of Australia and Supreme Court of Victoria (Court of Appeal) in *Hogan v Australian Crime Commission*[6] and *Digital News Media Pty Ltd v Mokbel*[7], respectively.

In contrast, where an order falls into the first category, it appears that the Court would adopt a narrower interpretation of 'necessary'.

Publication of internet material

Interestingly, the Court held that for the purposes of the Act publication of material on the internet is of a 'continuing' nature, that is access is being provided to the public for so long as the material is available on the internet.[8] In doing so, the Court adopted the High Court of Australia's test for publication in the context of defamation, namely that material on the internet is deemed to be published each and every time, and in each place, it is downloaded.[9]

This approach is in contrast to that taken by the Supreme Court of Victoria in *Mokbel,* in which it was held that the test of publication for contempt purposes differs to that for defamation, such that for the purpose of contempt proceedings publication occurs when and where the material is made available to a juror or potential juror 'whether it be shown that the person accessed it or not'.[10]

Futility and ineffectiveness of order

Notwithstanding its adoption of the broad interpretation of the term 'necessary' referred to above, the Court held that a suppression or non-publication order will fail the necessity test if it is 'futile' or 'ineffective'.[11]

In determining that the Order was not 'necessary', the Court considered that such an order would be futile as it was directed to parties who were not before the District Court, some of whom were dif-

2 Ibid [51].

3 Ibid [8].

4 *R v Perish* [2011] NSWSC 1102.

5 *R v Debs* [2011] NSWSC 1248.

6 *Hogan v Australian Crime Commission* (2010) 240 CLR 651.

7 *Digital News Media Pty Ltd v Mokbel* [2010] VSCA 51.

8 *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [43].

9 See: *Dow Jones v Gutnick* (2002) 210 CLR 575.

10 *Digital News Media Pty Ltd v Mokbel* [2010] VSCA 51 at [76].

11 *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [74] and [76].

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ficult to identify and did not reside or operate in NSW (for example, persons operating web sites and search engines around the world). Basten JA stated:

> *As a matter of principle, to make the orders effective, material must either be removed from any web site globally to which access can be had from New South Wales or there must be an ability to prevent access by people living in New South Wales. The evidence did not disclose that either of these was a realistic possibility.*[12]

The Court also held that it would be difficult to give proper notice of a suppression order, as is required under the Act, to an internet content host or search engine operator in another country and that such an order would be impracticable to enforce (particularly given that the relevant material could remain cached on innumerable web sites even when removed from the original web site to which it was uploaded). On this point, Basten JA stated:

> *…the fact that it is not possible to control material on servers outside Australia demonstrates the limited value of an order seeking to control availability on servers inside the country… Given the efficiency of modern search engines, limiting the number of sources, without removing them all, is likely to be ineffective.*[13]

The Court made a number of other observations, including that:

- the Act does not empower a trial judge to make a pre-emptory order requiring private individuals or other entities unconnected with the administration of justice to remove material from potential access by a juror;
- an order will not necessarily be futile because material is otherwise available in cached form even after it is removed from the source page;
- an order preventing public access to existing material (including a publication on a website) clearly falls within the scope of the Act;
- the fact that a search reveals thousands of 'hits' does not of itself mean that the offending material is able to be located easily, as it will be necessary to refer to items which have been given priority in the search results; and
- the test of necessity can only be satisfied if proper consideration is given to whether a jury is likely to abide by the directions it will be given to decide a matter only by reference to the material called in evidence, and without carrying out investigations themselves.

In addition, the Court noted that the Order was ineffective because it was worded too broadly. This is because the Order sought to prevent access to the material in all States and Territories in Australia, as opposed to only the jurisdiction in which the proceedings were taking place (in this case, NSW).

Constitutional validity of Act

The Court rejected Fairfax's argument that the Act, to the extent it empowered the order, was inconsistent with the *Broadcasting Services Act 1992* (Cth) (***BSA***) and therefore inoperative pursuant to section 109 of the *Australian Constitution.*

Under clause 91 of Schedule 5 of the BSA, internet service providers and internet content hosts (including search engines) may be protected from liability in relation to contravening material, in respect of which they have not been notified or are not aware.

The Court held that an order directed to an internet content host relating to material of which it had been made aware (assuming a Court is satisfied that the material has the tendency to prejudice the fairness of forthcoming proceedings) is not inconsistent with the Act. However, the Act does not give the Court power to make an order addressed to the world at large which, for example, covers material on internet sites of which the host is unaware.

Other observations

In addition to setting aside the Order, the Court noted that any continued or further publication of material having a tendency to interfere with the administration of justice in respect of the criminal proceedings may constitute a contempt of court.

The Court rejected Fairfax's argument that the Act, to the extent it empowered the order, was inconsistent with the *Broadcasting Services Act 1992* (Cth) (*BSA*) and therefore inoperative pursuant to section 109 of the *Australian Constitution.*

Implications

- A suppression or non-publication order will be less readily granted in order to prevent the publication of material disclosed in court proceedings (as opposed to material which has no connection with court proceedings except its capacity to affect current or future proceedings).
- It is likely that a suppression or non-publication order will be ineffective or futile (and therefore not 'necessary' under the Act) in circumstances where it is difficult to identify the publisher of online material (for example, where a publisher is not located or does not operate in the jurisdiction) and/or impracticable to enforce the order.
- In light of the decision, it will be interesting to see whether the Commonwealth Senate passes the Access to Justice (Federal Jurisdiction) Amendment Bill 2011 (Cth) which seeks to define the word 'publication' broadly so as to apply to the provision of access to material on the internet.

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12 Ibid [79].

13 Ibid [74].