The Exorbitant Injunction in *X v Twitter* [2017] NSWSC 1300

The Supreme Court of New South Wales has issued a global injunction enjoining overseas defendants to remove tweets of a corporate leaker...

By Michael Douglas

On 28 September 2017, the Supreme Court of New South Wales awarded a final injunction with global reach, directed towards the California-based Twitter Inc and its Irish counterpart, Twitter International Company.[1]

When I became aware of this case, I was midway through writing an article dealing with the same set of facts. On 8 September 2017, in *X v Y & Z*,[2] the Court continued and expanded an interlocutory injunction against anonymised defendants. It turns out that Y + Z = Twitter.

X v Twitter deals with an increasingly familiar problem: how can private individuals have content removed from the global internet through procedures of domestic courts?

Background

The plaintiff is an anonymous partnership, plagued by an anonymous troll with a vendetta. Unfortunately for the plaintiff, this person has access to some of the plaintiff's financial records.

In May, the troll began tweeting under a handle that adopted the name of the plaintiff's CEO. The tweets disclosed confidential financial information. The plaintiff was swift in bringing a complaint; Twitter removed the content for violation of its terms of service.

The plaintiff also requested that Twitter disclose information relating to the identity of this person, flagging a potential action against that person for breach of confidence. Twitter refused, appealing to its privacy policy.

The dodgy tweets continued. When the troll impersonated another officer of the plaintiff, Twitter removed the account. But when the troll took on a *nom de plume* that did not involve impersonation, Twitter refused to comply. The covert campaign of leaks continued into September.

In desperation, on 6 September, the plaintiff commenced these proceedings. That day, Stevenson J granted an interlocutory injunction restraining the publication of the offending material, causing the material to be removed from Twitter, and suspending the relevant Twitter accounts. On 8 September, at an *ex parte* hearing, Pembroke J extended those orders.

The final injunction went even further. It requires the ongoing removal of any accounts held by the anonymous troll(s). The Court also made suppression orders, and a *Norwich* order compelling Twitter to reveal identifying details, including IP addresses, of the anonymous leaker.

The exorbitant jurisdiction

The defendants refused to appear in the proceedings. On 8 September, they sent an email objecting to the Court's jurisdiction and the substance of the orders made.

There was an issue whether the court possessed jurisdiction *in personam*: the authority to bind the defendants personally. At common law, in the absence of the defendants' submission, jurisdiction is territorial.[3] Pembroke J may have considered that the defendants were not present. If so, respectfully, that may have been a mistake. At common law, a foreign corporation may be present by carrying on business in the forum.[4] Recently, in the *Google v Equustek* litigation, the Court of Appeal for British Columbia held that Google had carried on business in the forum by collecting data, providing search services, and mining AdWords revenue.[5] The court had jurisdiction as a natural consequence of the global scale of Google's business.[6] The finding was not disturbed by the Supreme Court of Canada[7] (noted by Hugh Tomlinson QC).[8]

In any event, if the defendants' email spoke to the merits of the injunction, that may have been a submission.[9]

Jurisdiction *in personam* may also be founded on long-arm provisions authorising service outside of the jurisdiction.[10] For NSW, those provisions are contained in the recently-amended UCPR Part 11 and

1 *X v Twitter Inc* [2017] NSWSC 1300.
2 *X v Y & Z* [2017] NSWSC 1214.
3 *Gosper v Sawyer* (1985) 160 CLR 548, 564 (Mason and Deane JJ).
4 *National Commercial Bank v Wimborne* (1979) 11 NSWLR 156, 165 (Holland J).
5 *Equustek Solutions Inc v Google Inc* (2015) 386 DLR (4th) 224.
6 *Equustek Solutions Inc v Google Inc* (2015) 386 DLR (4th) 224, 247 [56] (Groberman JA, Frankel and Harris JJA agreeing).
7 *Google Inc v Equustek Solutions Inc* 2017 SCC 34.
8 Hugh Tomlinson, 'Supreme Court of Canada upholds worldwide Google blocking injunction', *Gazette of Law & Journalism* (5 July 2017) <http://glj.com.au/2885-article>.
9 *Vertzyas v Singapore Airlines Ltd* (2000) 50 NSWLR 1, 23 [109] (Knight DCJ).
10 See *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 521 [25] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

Schedule 6.[11] Service is permitted where the claim has a prescribed connection to the forum.

Pembroke J accepted that the Court possessed *in personam* jurisdiction with appeal to the heads of Schedule 6, holding that '[a]mong other things, the injunction sought to compel or restrain the performance of certain conduct by the defendants everywhere in the world. That necessarily includes Australia'.[12]

If that proposition is accepted around the world, then every court would have jurisdiction to remove anything from the global internet. The *Equustek* case, and the expansion of the 'right to be forgotten',[13] are recent examples of a trend in that direction.

Not so long ago, this would have been lamented as involving 'exorbitant' jurisdiction.[14] The more modern view is that a court's long-arm jurisdiction is not objectionable *per se*, but the exorbitant *exercise* of jurisdiction may be objectionable.[15]

The exercise of discretion

It was uncontroversial that the defendants could owe an obligation of confidence to the plaintiff: it was held that the equitable principle extends to social networking services which facilitate the posting of confidential information.

Further, it was uncontroversial that, provided that a court of equity has jurisdiction *in personam*, conduct outside of the territorial jurisdiction may be enjoined.

The issue was whether it was proper for the court to exercise its discretion to make the award.

In its email of protest, Twitter argued that the injunction sought exceeded the proper limits of the use of the Court's powers. It appealed to *Macquarie Bank v Berg*,[16] where an injunction to restrain online defamation was refused, partly because defamation law is not uniform around the world. *Berg* was distinguished; however, the Court did not consider comparative laws of confidence. In contrast to the Supreme Court in *Google v Equustek*,[17] discussion of comity[18] was conspicuously absent.

Quite appropriately, the Court considered the utility of the order. Equity does not act in vain.[19] Extraterritorial enforcement of the injunction could not be guaranteed, but Twitter's commercial interests suggested voluntary compliance. It is likely that the global injunction will be implemented, albeit begrudgingly, for the sake of Twitter's standing in the Australian market. Rolph predicts that this 'soft effect of hard law is something I think we're going to see more of in the future'.[20]

Conclusion

When you attend a bar late at night, you may pass a large bouncer. That bouncer could crush your skull. He does possess that power. But just because he *can* do that does not mean that he *should* do that. Just because the court has authority to do X does not justify X. In my view, it may be questioned whether X was justified in *X v Twitter*.

I'm yet to be convinced that domestic courts should be so inclined to flex their muscles over the entire internet. Australian courts might protect corporate confidences, but then Chinese courts might protect CPC accounts of the Tiananmen Square Massacre. It is a slippery slope argument, but we ought to be cognisant of the role of reciprocity in private international law.

Michael Douglas lectures in private international law at Sydney Law School. He is currently researching cross-border media law issues. This comment first appeared in the Gazette of Law & Journalism on 29 September 2017.

11 See Michael Douglas and Vivienne Bath, 'A new approach to service outside the jurisdiction and outside Australia under the Uniform Civil Procedure Rules' (2017) 44(2) *Australian Bar Review* 160.

12 *X v Y & Z* [2017] NSWSC 1214, [11]; *X v Twitter Inc* [2017] NSWSC 1300, [20].

13 See Alex Hurn, 'ECJ to rule on whether 'right to be forgotten' can stretch beyond EU', *The Guardian* (online) 20 July 2017 <https://www.theguardian.com/technology/2017/jul/20/ecj-ruling-google-right-to-be-forgotten-beyond-eu-france-data-removed>.

14 *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50, 65 (Lord Diplock).

15 *Abela v Baadarani* [2013] 1 WLR 2043, 2062–3 [53] (Lord Sumption).

16 *Macquarie Bank Limited v Berg* [1999] NSWSC 526, [13]–[14] (Simpson J).

17 *Google Inc v Equustek Solutions Inc* 2017 SCC 34, [44]–[48] (Abella J, McLachlin CJ, Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ agreeing), [80] (Côté and Rowe JJ).

18 See *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 395–6 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

19 See Norman Witzleb, 'Equity does not act in vain': An analysis of futility arguments in claims for injunctions' (2010) 32(3) *Sydney Law* Review 503.

20 David Marin-Guzman, 'Twitter ordered to take action against mysterious corporate leaker', *Financial Review* (online) 28 September 2017 < http://www.afr.com/leadership/company-culture/twitter-ordered-to-take-action-against-mysterious-corporate-leaker-20170928-gyqi42>.