

FEDERAL COURT OF AUSTRALIA

West v TWG Services Limited [2010] FCA 1062

Citation: West v TWG Services Limited [2010] FCA 1062

Parties: COLIN WEST v TWG SERVICES LIMITED

File number: VID 1073 of 2008

Judge: GRAY J

Date of judgment: 3 September 2010

Catchwords: **CIVIL PROCEDURE** – service – service of originating process outside Australia – proceeding including claims for misleading and deceptive conduct, statutory entitlements to accrued annual leave and breaches of contract – whether Court has jurisdiction in the proceeding – whether proceeding consists of or includes one or more of the kinds of proceeding specified in relevant rule – whether prima facie case for all or any relief sought – whether requirements as to evidence to be given on application for leave met – whether statement that service in England to be effected by a private agent validly in accordance with law of England and Wales sufficient

Legislation: *Trade Practices Act 1974 (Cth) s 52*
Federal Court Rules O 8 r 2, O 8 r 3, O 8 r 3(2)(c), O 13 r 3(1)

Cases cited: *West v TWG Services Limited* [2009] FCA 1052 referred to

Date of hearing: 3 September 2010

Place: Melbourne

Division: FAIR WORK DIVISION

Category: Catchwords

Number of paragraphs: 10

Counsel for the applicant: Mr S J Wood and Mr M Follett

Solicitor for the applicant: Harmers Workplace Lawyers

Counsel for the respondent: The respondent did not appear

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
FAIR WORK DIVISION**

VID 1073 of 2008

**BETWEEN: COLIN WEST
Applicant**

**AND: TWG SERVICES LIMITED
Respondent**

JUDGE: GRAY J

DATE OF ORDER: 3 SEPTEMBER 2010

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT the proceeding be stood over until 2.15 pm this day.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using Federal Law Search on the Court's website.

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
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VID 1073 of 2008

BETWEEN: COLIN WEST
Applicant

AND: TWG SERVICES LIMITED
Respondent

JUDGE: GRAY J

DATE: 3 SEPTEMBER 2010

PLACE: MELBOURNE

REASONS FOR JUDGMENT

1 On 18 September 2009, I made orders in this proceeding, dismissing an application for leave to serve the originating process on the respondent outside Australia. I also ordered that there be no order as to the applicant's costs of that application and reserved liberty to the applicant to apply in the proceeding. On that occasion, I published reasons for judgment. See *West v TWG Services Limited* [2009] FCA 1052. In the course of those reasons for judgment, I expressed the conclusion that, with respect to most of the causes of action on which the applicant then relied, he had failed to satisfy the requirement of O 8 r 3(2)(c) of the *Federal Court Rules* (Cth) ("the Federal Court Rules") that he have a prima facie case for the relief he claimed in the proceeding. My conclusion was that, with respect to most of the seven causes of action then relied on, there was not a prima facie case. As an order granting leave to serve originating process outside Australia was a discretionary matter, I took the view that I ought not exercise my discretion in favour of the applicant, when he was unable to make out a prima facie case with respect to the preponderance of his claims.

2 By notice of motion filed on 30 August 2010, the applicant has exercised his liberty to apply again. He has done so in conjunction with an application further to amend his amended application and his amended statement of claim.

3 In the meantime, there has been an amendment to O 8 r 3(2)(c) of the Federal Court Rules. The requirement of those rules is no longer that the person seeking leave have a prima

facie case for the relief claimed. It is only that the person seeking leave have a prima facie case for all or any of the relief claimed.

4 It is necessary for the applicant to apply for leave to amend his application and his statement of claim again, because he has already made amendments to those documents on one occasion. Order 13 r 3(1) of the Federal Court Rules has the effect of permitting a party to amend once without leave. That opportunity has been used up.

5 The effect of the amendment sought by the applicant is to reduce the number of causes of action on which he relies to four. His claim involves: a claim of misleading and deceptive conduct, in contravention of s 52 of the *Trade Practices Act 1974* (Cth); a claim for failure to pay accrued annual leave on termination of employment, which is based alternatively on an allegation of breach of contract or on a claim for entitlements pursuant to the *Workplace Relations Act 1996* (Cth) (“the Workplace Relations Act”); a claim for breach of contract for failing to provide reasonable notice for the termination of the assignment of the applicant to perform duties in Australia; and a claim for payment in relation to an alleged contractual entitlement that is called the “enhanced redundancy package”.

6 For reasons similar to those that I published on 18 September 2009, I take the view that the Court has jurisdiction in this proceeding. It has statutory jurisdiction with respect to the two statutory causes of action and accrued jurisdiction with respect of the causes of action based on alleged contractual obligations. Again, for reasons similar to those pronounced on that occasion, I take the view that the proceeding is of a kind mentioned in O 8 r 2 of the Federal Court Rules. Such a proceeding is one which consists of or includes any one or more of the kinds of proceeding mentioned in the table in that rule. Item 11 in that table is a proceeding based on a breach of a provision of an Act that is committed in Australia. Item 12 is a proceeding based on a breach of a provision of an Act, wherever occurring, seeking relief in relation to damage suffered wholly or partly in Australia. Item 13 is a proceeding in relation to the construction, effect or enforcement of an Act, or a regulation or other instrument having, or purporting to have, effect under an Act. As to the two statutory causes of action on which the applicant relies it is clear that they fit within one or more of those categories. It is unnecessary, therefore, to engage in an inquiry into questions in relation to any alleged contract, as to where the contract was made and what law governs it.

7 As to O 8 r 3(2)(c), I can content myself with saying that the applicant has a prima facie case for some of the relief claimed. I refer in particular to the claim pursuant to the Workplace Relations Act, which is dealt with in my previous reasons for judgment. Having regard to the evidence now put on affidavit by the applicant, I am also satisfied that there is a prima facie case for the relief claimed in relation to the alleged contractual obligation to pay what is called the "enhanced redundancy package." As to other causes of action, it is unnecessary for me to express a view as to whether there is a prima facie case for the relief claimed and I prefer not to do so.

8 The effect of the change to O 8 r 3(2)(c) and the additional evidence that is before me today are sufficient to persuade me to exercise my discretion in favour of the applicant and to allow him both to amend his application and statement of claim and to serve that further amended application and further amended statement of claim outside Australia.

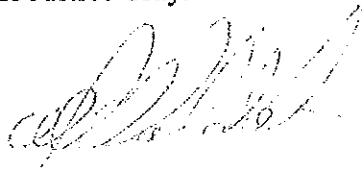
9 Order 8 r 3 of the Federal Court Rules provides for some requirements as to the evidence in relation to an application like this. The evidence must include the name of the foreign country where the person is to be served. That requirement is satisfied in the present case. The respondent is a corporation, incorporated in England. On the evidence before me, it has a registered office in England. That evidence is now more than two years old, and it may be necessary for the applicant to conduct another search to ascertain whether the registered office is still in the same place. The second requirement is that there be evidence as to the proposed method of service. The third requirement is that there be a statement that the proposed method of service is permitted by the relevant convention, if a convention applies or, if there is no convention, by the law of the foreign country concerned.

10 The evidence relating to the third requirement is given largely by reference to information obtained from the internet web page of the Attorney-General's Department in Australia. That information is to the effect that there is no convention, treaty or other agreement in force between Australia and the United Kingdom in relation to the service of documents in civil proceedings. The information indicates that service by private agent is permitted, and that service through an agent, generally a British lawyer, does not breach United Kingdom law and is not considered by the United Kingdom government to be a breach of its sovereignty. Accordingly, the evidence indicates that the proposal is to arrange for a private agent to effect service. Although the affidavit says that the proposal is to

arrange for service to be effected validly in accordance with the laws of England and Wales at the respondent's registered office, I do not think that that degree of detail satisfies the requirement that there be evidence as to the proposed method of service, or a statement that the proposed method of service is permitted by the law of England. Accordingly, for the present, I propose simply to indicate that, if such evidence can be provided by means of a further affidavit of the applicant's solicitor, I am content to make orders of the kind sought in the notice of motion filed on 30 August 2010, and to stand the matter over until that further evidence is provided.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the reasons for judgment herein of the Honourable Justice Gray.

Associate:



Dated: 29 September 2010