

# FEDERAL COURT OF AUSTRALIA

## DHI22 v Qatar Airways Group Q.C.S.C [2023] FCA 616

File number(s): NSD 837 of 2022

Judgment of: **HALLEY J**

Date of judgment: 8 June 2023

Catchwords: **PRACTICE AND PROCEDURE** – allegations of negligence, assault, battery and false imprisonment – interlocutory application – application for service outside Australia under r 10.43(4) and r 10.44 of the *Federal Court Rules 2011* (Cth) – application for substituted service under r 10.24 and r 10.49 of the Rules – application granted

Legislation: *Federal Court of Australia Act 1976* (Cth) ss 37AF, 37AI, 37M, 51A  
*Federal Court Rules 2011* (Cth) rr 1.34, 9.05, 10.24, 10.42, 10.43, 10.44, 10.46, 10.49, 10.51

Cases cited: *Australian Information Commission v Facebook Inc* [2020] FCA 531  
*Commissioner of Taxation v Oswal* [2012] FCA 1507  
*Commissioner of Taxation v Zeitouni* [2013] FCA 1011  
*Commissioner of Taxation v Caratti (No 2)* [2018] FCA 1500  
*Ford, in the matter of Careers Australia Group Ltd (in liq) v Mansfield* [2022] FCA 173  
*Humane Society International Inc v Kyodo v Senpaku Kaisha Ltd* [2007] FCA 124

Division: General Division

Registry: New South Wales

National Practice Area: Other Federal Jurisdiction

Number of paragraphs: 31

Date of last submission: 26 May 2023

Date of hearing: Determined on the papers

Counsel for the Applicants: Dr C Ward SC with Mr R Reynolds

Solicitor for the Applicants: Marque Lawyers

Counsel for the Respondents: The First and Second Respondents did not file submissions

# ORDERS

NSD 837 of 2022

**BETWEEN:**            **DHI22**  
First Applicant

**DHJ22**  
Second Applicant

**DHK22** (and others named in the Schedule)  
Third Applicant

**AND:**                 **QATAR AIRWAYS GROUP Q.C.S.C**  
First Respondent

**QATAR CIVIL AVIATION AUTHORITY**  
Second Respondent

**QATAR COMPANY FOR AIRPORTS OPERATION AND  
MANAGEMENT**  
Third Respondent

**ORDER MADE BY:**   **HALLEY J**  
**DATE OF ORDER:**   **8 JUNE 2023**

## THE COURT ORDERS THAT:

1. Leave be granted to the applicants to serve the Further Amended Statement of Claim on the third respondent, pursuant to r 10.44 of the *Federal Court Rules 2011* (Cth) (**Rules**).
2. Pursuant to r 10.24 or alternatively, r 10.49 of the Rules, personal service of the Further Amended Originating Application and the Further Amended Statement of Claim on the Qatar Company for Airports Operation and Management (**MATAR**) is dispensed with, and the applicants may serve a sealed copy of the Further Amended Originating Application and Further Amended Statement of Claim on MATAR by transmitting them by email to the solicitors for the first respondent, Qatar Airways Group Q.C.S.C, at [smorris@m2law.com.au](mailto:smorris@m2law.com.au) and [triddell@m2law.com.au](mailto:triddell@m2law.com.au).

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

## REASONS FOR JUDGMENT

**HALLEY J:**

### A. INTRODUCTION

1 On 30 September 2022, the applicants commenced this proceeding against the first respondent, the Qatar Airways Group Q.C.S.C. (**Qatar Airways**) and the second respondent, the Qatar Civil Aviation Authority (**Qatar CAA**).

2 In their originating application, the applicants sought declarations which include that both respondents are liable for negligence and that Qatar CAA is liable for assault, battery and false imprisonment and damages and interest pursuant to s 51A of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**). The applicants' names have been suppressed under s 37AF and s 37AI of the FCA Act pursuant to orders made by Burley J on 6 October 2022.

3 On 23 May 2023, I made orders pursuant to r 9.05(1) of the *Federal Court Rules 2011* (Cth) granting leave to the applicants to join the Qatar Company for Airports Operation and Management (**MATAR**) to the proceeding.

4 On 24 May 2023, the applicants filed a Further Amended Originating Application and Further Amended Statement of Claim (**Amended Pleadings**) which named MATAR as the third respondent. The applicants seek declarations in the Further Amended Originating Application that MATAR is liable for negligence, assault, battery and false imprisonment.

5 MATAR is yet to be served personally with any document in this proceeding. MATAR is a company incorporated in Qatar. The sole shareholder of MATAR is Qatar Airways.

6 The applicants now press for the orders that they had sought in their interlocutory application filed 5 May 2023 under r 10.44 of the Rules to serve the Further Amended Statement of Claim on MATAR.. The applicants submit that they do not require the Court's leave to serve the Further Amended Originating Application on MATAR by reason of r 10.42(a) of the Rules but in the alternative, press for the Court's leave to effect service outside Australia under r 10.43(4) of the Rules. The applicants also press for an order under r 10.24 and r 10.49 of the Rules for substituted service of the Amended Pleadings by email to the solicitors for Qatar Airways (**Service Application**).

7 The applicants rely on a comprehensive outline of submissions that they filed on 26 May 2023  
and affidavits from their solicitor, Damian Bruce Sturzaker of Marque Lawyers, affirmed on  
27 September 2022, 6 October 2022 and 5 May 2023.

8 Neither Qatar Airways nor Qatar CAA wished to be heard on the Service Application.

9 In the circumstances, and in the absence of any request for an oral hearing, I considered it  
appropriate to determine the Service Application on the papers.

## **B. SERVICE OF DOCUMENTS OUTSIDE AUSTRALIA**

### **B.1 Relevant rules and principles**

10 Rule 10.42 of the Rules provides for the circumstances when an originating application may  
be served outside Australia without leave of the Court.

11 Rule 10.42(a) relevantly provides that an originating application may be served outside  
Australia without leave:

- (a) if the proceeding is founded on a tortious act or omission:
  - (i) that was done or occurred wholly or partly in Australia; or
  - (ii) in respect of which the damage was sustained wholly or partly in  
Australia;

12 Rule 10.43 of the Rules provides for the circumstances when an originating application may  
be served outside Australia with leave of the Court.

13 Rule 10.43(4) relevantly provides that an originating application may be served outside  
Australia with leave if the Court is satisfied that:

- (a) the proceeding has a real and substantial connection with Australia; and
- (b) Australia is an appropriate forum for the proceeding; and
- (c) in all the circumstances the Court should exercise jurisdiction.

14 Rule 10.44 of the Rules provides that documents other than an originating application require  
the leave of the Court to be served outside Australia and that the Court may grant leave with  
any directions it considers appropriate.

15 Rule 10.46 of the Rules provides that a document to be served outside Australia does not need  
to be personally served on a person so long as it is served on the person in accordance with the  
law of the country in which service is effected. In the note to r 10.46, it provides that the law  
of a foreign country may permit service through the diplomatic channel.

## **B.2 Whether leave is required to serve the originating application**

16 The applicants submit that they do not require the Court's leave to serve the Further Amended Originating Application on MATAR. The applicants accept that they require leave to serve the Further Amended Statement of Claim on MATAR under r 10.44 of the Rules.

17 I am satisfied that the applicants do not require leave to serve the Further Amended Originating Application on MATAR under r 10.42(a) because this proceeding is founded on a tortious act or omission. In the Further Amended Statement of Claim, the applicant particularise claims directed to MATAR for negligence, assault, battery, and false imprisonment. The applicants also claim that the damage sustained by the applicants was sustained partly in Australia, being the mental harm suffered by the applicants since their flight QR908 returned to Australia on 3 October 2020.

18 If I have otherwise erred in finding that the applicants do not require leave to serve the Further Amended Originating Application on MATAR, I accept the applicants alternative submission that leave should be granted pursuant to r 10.43(4) of the Rules. *First*, I am satisfied that the proceeding has a real and substantial connection with Australia, in satisfaction of r 10.43(4)(a). At the time of the incident, each applicant was returning to reside in Australia and sustained damage partly in Australia. *Second*, I am satisfied that Australia is the appropriate forum for the proceeding under r 10.43(4)(b) given the applicants have ongoing proceedings against Qatar Airways and Qatar CAA. *Third*, I am also satisfied that the Court should otherwise exercise jurisdiction under r 10.43(4)(c), in all the circumstances, particularly given that the Court previously granted leave to serve documents in this proceeding on Qatar CAA outside Australia.

19 Relatedly, and for the foregoing reasons, I am also satisfied that leave should be granted under r 10.44 of the Rules to serve the Further Amended Statement of Claim on MATAR.

## **C. SERVICE ON PERSONS IN QATAR**

20 Qatar is not a signatory to the Hague Convention. Mr Sturzaker gives evidence that, after making extensive enquiries, he has not identified any other convention with Qatar in relation to service of legal documents. The enquiries undertaken include obtaining information from the Australian Government Attorney-General's Department in relation to the appropriate method of transmitting documents for service in Qatar.

21 Without an order for substituted service, r 10.46 of the Rules dictates that the Further Amended Statement of Claim, and alternatively, the Amended Pleadings, must be served in accordance with the laws of Qatar. By an email dated 23 September 2022, an employee of the Attorney-General’s Department provided information confirming that service in Qatar could be effected through diplomatic channels.

## D. SUBSTITUTED SERVICE

### D.1 Relevant rules and principles

22 The Court’s discretion to order substituted service under r 10.24 or r 10.49 of the Rules is “enlivened” when it grants leave for service on a person in a foreign country: *Humane Society International Inc v Kyodo v Senpaku Kaisha Ltd* [2007] FCA 124 at [6]-[7] (Allsop J, as his Honour then was) and cited with approval in the following cases; *Commissioner of Taxation v Oswal* [2012] FCA 1507 at [32] (Gilmour J); *Commissioner of Taxation v Zeitouni* [2013] FCA 1011; (2013) 306 ALR 603 at [26]-[32] (Katzmann J); *Australian Information Commission v Facebook Inc* [2020] FCA 531 at [66] (Thawley J); *Ford, in the matter of Careers Australia Group Ltd (in liq) v Mansfield* [2022] FCA 173 at [32] (O’Bryan J).

23 Rule 10.24 of the Rules provides that a party may apply to the Court for orders in respect of substituted service “if it is not practicable” to serve a document on a person in accordance with the Rules. It is not necessary for a party to show that personal service would be impossible or infeasible to meet the threshold under r 10.24 of the Rules. As Allsop J (as his Honour then was) stated in *Humane Society* at [14], on one view, “impracticable” is wide enough to refer to circumstances when it is “not sensible or realistic” to effect service in accordance with the Rules: see also *Zeitouni* at [67] (Katzmann J); *Facebook* at [67] (Thawley J); *Commissioner of Taxation v Caratti (No 2)* [2018] FCA 1500 at [10] (Colvin J). The Court is more likely to exercise its discretion and make an order for substituted service if it can be “reasonably satisfied” that the method of substituted service will bring the documents to the attention to the party to be served: *Oswal* at [34] (Gilmour J) and *Mansfield* at [60] (O’Bryan J).

24 Rule 10.49 of the Rules provides for substituted service if service on a person outside Australia in accordance with a convention, the Hague Convention or the law of a foreign country, “was not successful”.

## **D.2 Whether orders for substituted service should be made**

25 The applicants submit and I accept that service through the diplomatic channel on MATAR is “neither a sensible nor a practicable method of service”. I am satisfied for the following reasons that the orders sought by the applicants for substituted service on MATAR should also be made.

26 *First*, Mr Sturzaker gave evidence that service on MATAR “is likely to take six months or more” given his experience arranging for service through diplomatic channels on Qatar CAA. On 6 October 2022, Burley J granted leave to serve Qatar CAA through the diplomatic channel. As at 20 April 2023, approximately 6 months later, the Department of Foreign Affairs and Trade had still not received a formal certificate of service.

27 *Second*, this proceeding has been on foot since September 2022. Both Qatar Airways and Qatar CAA have interlocutory applications pending. Qatar Airways’ interlocutory application seeks summary judgment or strike out orders. It is likely to be heard together with any similar interlocutory application by MATAR. Qatar CAA’s interlocutory application seeks orders to set aside the originating application on the basis of its asserted foreign state immunity. Any substantive delay in the hearing of either application because of a six month or more delay in effecting service through the diplomatic channel would be inimical to the promotion of the overarching purpose of civil practice and procedure provisions.

28 A likely lengthy delay in effecting service on defendants in the Czech Republic contributed to O’Byrne J making orders for substituted service in *Mansfield*, having regard to s 37M of the FCA Act and that the existence of the claim would be “entirely unsurprising to them”: at [33] and [59]. In the present case, the existence of the allegations in the Amended Pleadings could also readily be inferred to be “entirely unsurprising” to MATAR. The company searches obtained by the applicants, record that MATAR is a wholly owned subsidiary of Qatar Airways and it shares the same registered address. Moreover, the company searches reveal that the Chief Executive Officer of Qatar Airways is also the Chief Executive Officer of MATAR.

29 *Third*, I am satisfied that the proposed method of substituted service will bring the Amended Pleadings to the attention of MATAR. As stated above, MATAR is a wholly owned subsidiary of Qatar Airways and it shares the same registered address and Chief Executive Officer. Further, the address for substituted service is the address of the solicitors retained by Qatar Airways in these proceedings.




30 Finally, I am satisfied that the Court may also order substituted service under r 10.49 of the Rules if service on a person outside Australia under a convention or foreign law “was not successful” and the Court may exercise its power under r 1.34 to dispense with the implied requirement that an attempt at service must first be made: *Facebook* at [66].

**E. DISPOSITION**

31 The orders sought by the applicants for personal service of the Amended Pleadings on MATAR to be dispensed with and for substituted service of the Amended Pleadings on MATAR are to be made.

I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Halley.

Associate: 

Dated: 8 June 2023

## **SCHEDULE OF PARTIES**

**NSD 837 of 2022**

### **Applicants**

Fourth Applicant: DHL22

Fifth Applicant: DHM22